

buyer by the refiner-seller pursuant to paragraph (b) of this rule.

(f) Prior to April 15, 1974, refiner-sellers and refiner-buyers shall enter into sales contracts for the delivery and purchase of crude oil pursuant to paragraph (b) of this rule.

(g) Any refiner-buyer which is unable to negotiate a contract prior to April 15, 1974 to purchase crude oil pursuant to paragraph (b) of this rule may request the FEO, prior to April 20, 1974, to direct a refiner-seller or refiner-sellers to sell an appropriate amount of an acceptable type of crude oil to such refiner-buyer. Upon such a request, the FEO may so direct the refiner-seller or refiner-sellers.

(h) The provisions of § 211.65(a), (b), (c) and (k) are applicable to all sales made pursuant to this rule. The provisions of § 211.65(l) apply in the same manner during the month of May, 1974 with respect to the second crude oil sales period as was provided for imports during the first crude oil sales period.

(i) The provisions of Subpart C of Part 211 (including but not limited to the procedures and reporting requirements of § 211.66) shall remain in full force and effect except as expressly modified by the provisions of this rule.

[FR Doc. 74-7824 Filed 4-1-74; 5:01 pm]

Title 12—Banks and Banking

CHAPTER V—FEDERAL HOME LOAN BANK BOARD

SUBCHAPTER B—FEDERAL HOME LOAN BANK SYSTEM

[No. 74-224]

PART 528—NONDISCRIMINATION IN LENDING

Data on Applicants

MARCH 22, 1974.

Under section 808(d) of the Civil Rights Act of 1968, Federal agencies, including the Federal Home Loan Bank Board, are required to administer their programs and activities relating to housing and urban development in a manner affirmatively to further fair housing. Section 805 of the Act prohibits member institutions and other lenders from discriminating on the basis of race, color, religion, or national origin against any person applying for a loan or other financial assistance for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling. This regulation is intended as a means of providing information to the Board that will enable it to gauge compliance with the Act.

On January 13, 1972 the Federal Home Loan Bank Board by Resolution No. 72-50 (37 FR 811) proposed to amend the Regulations for the Federal Home Loan Bank System (12 CFR Chapter V, Subchapter B) by adding a new Part 528 thereto relating to nondiscrimination requirements. Among the provisions proposed to be added to implement the Board's responsibilities under title VIII of the Civil Rights Act of 1968 was § 528.6 which would have required member institutions to request that every applicant fill in a form indicating the applicant's race or ethnic descent at the time he or she submits an application for a loan or other service covered by title VIII. In the

case of a denial of an application, the member institution would have been required to fill in a second part of the form indicating the date of denial and the reasons therefor. The member institution would also have been required by the proposed regulation to maintain a copy of the form—whether an application was approved or denied—for a specified period of time.

On April 21, 1972, by Resolution No. 72-476 (37 FR 8436, 8865), the Federal Home Loan Bank Board adopted the other provisions of the proposed part 528, to be effective May 1, 1972, but postponed final action on section 528.6 pending discussion, and possible coordination of a similar recordkeeping requirement to be implemented by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency. Since that time the Board has met with these other agencies with the result that an agreement has been reached that all of the agencies will institute, on a trial basis, a racial recordkeeping requirement prior to imposing the requirement nationwide. The trial period will be six months, and the requirement will only apply to institutions located in a sample of eighteen selected Standard Metropolitan Statistical Areas (SMSA's) as defined by the Department of Commerce. The four Federal regulatory agencies have developed three distinct data forms. Each one of these forms will be used in six cities; all financial institutions in a given city (regardless of which Federal agency is responsible for regulating each institution) will utilize the same form. Analysis and processing of the reports submitted by the lending institutions will be done by the agency responsible for the particular institution. The period chosen for the trial is June 1, 1974 through November 30, 1974. Subsequently, the results of the various data collection procedures will be evaluated and each agency involved will make a determination as to whether and in what manner the collection and reporting of data shall be continued.

The Board considers it desirable to amend part 528 by adding a new § 528.6 thereto. Copies of the appropriate form will be distributed to the institutions subject to this amendment. Form 'A' differs from the form which the Board proposed in January 1972 insofar as Part II of the earlier proposed form (reasons for disapproval) has been eliminated. The member institution would be required to fill in an application number and the census tract (or other census district or division) in which the property is located. The applicant would fill in the remainder of the form, providing his or her race or ethnic descent, age, sex, and marital status. Language has been added to indicate that completion of the form by the applicant is voluntary. A report summarizing the data collected on the forms is required. Form 'B' differs from Form 'A' in that the lender must provide the reason for disapproval of the application, the zip code, instead of the census tract of the property is required, and the applicant's age,

sex, and marital status are not required to be provided. A report summarizing the data collected on the forms is required. Form 'C' differs from Form 'A' in that the lender must provide the reasons for disapproval of the application, and, rather than submitting a report, the completed forms are returned to Washington for processing. The applicant must provide his or her gross combined annual income, years at his or her present occupation, combined outstanding debts, combined monthly debt payments, combined assets, the amount of the loan requested, the purchase price of the subject property and whether it will be owner-occupied.

The Federal Home Loan Bank Board, in Resolution No. 72-50, dated January 13, 1972, proposed to amend the Regulations for the Federal Home Loan Bank System (12 CFR, Chapter V, Subchapter B) by adding a new Part 528 thereto relating to nondiscrimination requirements. Notice of such proposed rulemaking was duly published in the FEDERAL REGISTER on January 19, 1972 (37 FR 811), with an invitation to interested persons to submit written comments. On April 21, 1972, by Resolution 72-476 (37 FR 8436, 8865), The Federal Home Board Loan Bank Board adopted the other provisions of the proposed part 528, to be effective May 1, 1972, but postponed final action on § 528.6. On the basis of its consideration of all relevant material presented by interested persons and otherwise available, the Board hereby amends Part 528 by adding a new section, § 528.6, as set forth below. Since affording notice and public procedure on the above amendment would delay it from becoming effective for a period of time, and since this amendment in substantially the same form has already been subject to comment, and because of the experimental and temporary nature of the requirement, the Board hereby finds that notice and public procedure thereon are impracticable, unnecessary and contrary to the public interest under the provisions of 12 CFR 508.11 and 5 U.S.C. 553(b); and the Board hereby provides that such amendment shall become effective as of June 1, 1974.

§ 528.6 Data on loan applicants.

(a) *Recordkeeping requirements.* Each member institution shall, to the extent prescribed herein, require that each application submitted to it for a loan or other service described in § 528.2 with respect to real property located in a standard metropolitan statistical area, defined by the Department of Commerce and listed in paragraph (b), (c), or (d) of this section, shall be accompanied by a "Fair Housing Information Statement," as prescribed by the Board, which shall be separate from the application. Each applicant shall be requested to sign and complete the applicant's portion of the Statement at the time the application is made.

(b) *Form A—(1) Areas of applicability.* The recordkeeping and reporting requirements of this paragraph shall apply

with respect to each application for a loan or other service relating to a dwelling, which application is made to an office of a member institution located in one of the following standard metropolitan statistical areas:

Atlanta, Georgia
Buffalo, New York
Chicago, Illinois
San Antonio, Texas
San Diego, California
Washington, D.C.—Maryland—Virginia

(2) *Requirements.* The Statement shall be completed in duplicate by the applicant, except that the census tract designation for the location of the property shall be supplied by the member institution, and the copy shall be given to the applicant at the time the application is made or as promptly thereafter as practicable. The original shall be retained by the member institution for at least three years following the date of the application whether or not the loan is approved. If the application is approved, the original retained by the member institution shall be placed in its file on the loan. If the application is denied, the original retained by the member institution, along with the application and any supporting materials, other than materials which belong to the applicant and which are returned to the applicant at the applicant's request, shall be placed in a file of rejected applications and retained for the period specified above. The material so retained shall include a specific statement of the reasons for denial of the application.

(3) *Reporting.* Each member institution subject to this paragraph shall report, in such manner and on such forms as the Board may prescribe, data contained in "Fair Housing Information Statements" and in other materials relating to applicants subject to this part. Such reports shall be filed within 30 business days of the close of the reporting period. Such information shall be available to the public in such manner as will further the purpose of this part without resulting in injury to a private interest intended to be protected by law.

(c) *Form B—(1) Areas of applicability.* The recordkeeping and reporting requirements of this paragraph shall apply with respect to each application for a loan or other service relating to a dwelling, which application is made to an office of a member institution located in one of the following standard metropolitan statistical areas:

Baltimore, Maryland
Galveston-Texas City, Texas
Jackson, Mississippi
Jersey City, New Jersey
Tampa-St. Petersburg, Florida
Vallejo-Fairfield-Napa, California

(2) *Requirements.* The Statement shall be completed in duplicate. The original shall be retained by the member institution for at least three years following the date of the application whether or not the application is approved. If the application is approved, both copies shall be placed in the member institution's file on the loan. If the application is denied, the member institution shall complete Part II of the Statement, shall provide the applicant with a completed copy of Parts I and II of the Statement and shall retain for three years the original copy of the Statement as part of the written application. The member institution shall also retain for the period specified above any other documents obtained in connection with the application, except for documents which are the property of the applicant and which the applicant requests be returned.

(3) *Reporting.* Each member institution subject to this paragraph shall report, in such manner and on such forms as the Board may prescribe, data contained in "Fair Housing Information Statements" and in other materials relating to applicants subject to this part. Such reports shall be filed within 30 business days of the close of the reporting period. Such information shall be available to the public in such manner as will further the purpose of this part without resulting in injury to a public or private interest intended to be protected by law.

(d) *Form C—(1) Area of applicability.* The recordkeeping and reporting re-

quirements of this paragraph shall apply with respect to each application for a loan for the purpose of purchasing or constructing a dwelling, which application is made to an office of a member institution located in one of the following standard metropolitan statistical areas:

Bridgeport, Connecticut
Cleveland, Ohio
Memphis, Tennessee
Montgomery, Alabama
Topeka, Kansas
Tucson, Arizona

(2) *Requirement.* Each member institution shall require every person who meets with an officer or employee of the institution for the purpose of discussing the prospects for making formal written application, or for the purpose of making formal written application, for a loan for the purpose of purchasing or constructing a dwelling to complete a copy of Parts I and II of the Form. The member institution shall provide the census tract designation for the location of the property and, if the application is denied or if a written loan application is not submitted by the applicant within four weeks subsequent to the completion of Parts I and II, shall complete Part III of the Form.

(3) *Reporting.* Each member institution subject to this shall report, in such manner and on such forms as the Board may prescribe, data contained in "Fair Housing Information Statements" and in other materials relating to applicants subject to this part. Such reports shall be filed within 30 business days of the close of the reporting period and such reports shall include all completed Statements. Such information shall be available to the public in such manner as will further the purpose of this part without resulting in injury to a public or private interest intended to be protected by law.

By the Federal Home Loan Bank Board.

[SEAL] GRENVILLE L. MILLARD, Jr.,
Assistant Secretary.

FORM A

FAIR HOUSING INFORMATION STATEMENT
Federal Home Loan Bank Board
Washington, D. C. 20552

Name and Address of Association		Docket No.		Application Granted Denied No.	
		001		002 003	
State	County	SNBA	006	Census Tract	
004		005			

TO PROTECT THE CIVIL RIGHTS OF ALL BORROWERS IN ACCORDANCE WITH FEDERAL LAW, THE FEDERAL GOVERNMENT REQUESTS THAT YOU PROVIDE THE FOLLOWING INFORMATION WHICH MAY BE REVIEWED BY GOVERNMENT AUTHORITIES TO ASSURE FAIR TREATMENT OF ALL LOAN APPLICANTS.

This lending institution does not consider race, color, religion, or national origin in determining whether or not you should receive a loan. It reviews a variety of factors when considering a loan application. These include: (1) the income of the applicant and other family members; (2) the appraised value of the property; and (3) credit references.

If your loan application is disapproved, you are entitled to have the reasons explained to you. If you have cause to believe that you have been denied a loan because of race, color, religion, or national origin, you may discuss the matter with the management of this lending institution, and you have the right to file a complaint, containing relevant facts, including dates, and your name, with:

Assistant Secretary for Equal Opportunity
Department of Housing and Urban Development
Washington, D. C. 20410

or your local department of Housing and Urban Development or Federal Housing Administration Office, or you may take any other appropriate action provided by law. (Title 42, Section 3612, United States Code).

TO THE APPLICANT: COMPLETION OF THIS FORM IS COMPLETELY VOLUNTARY. If, after reading this form, you decline to supply this information, "X" this box 007 and sign your name at the end of this form.					
Name of Applicant	Age	Sex	Marital Status	007	
008 Male 010 Single 011 Married	009 Female 012 Divorced 013 Widowed				
Name of Spouse or Other Applicant	Age	Sex	Marital Status		
014 Male 016 Single 017 Married	015 Female 018 Divorced 019 Widowed				

Please indicate your race or ethnic descent. If you fit into more than one category, please check the one which you believe best describes you. "Spanish Descent" includes persons of Puerto Rican, Cuban, Mexican and Central and South American descent.

Signature of Applicant →

THIS-A
March 1974

FORM B

THIS - B

FEDERAL HOME LOAN BANK BOARD

FAIR HOUSING INFORMATION STATEMENT

Application Number _____
Amount of Loan Requested _____

Name of Applicant _____
Address of Property: _____
Spouse's or Other Applicant's Name _____

Street _____
City _____ State _____ Zip Code _____

TO PROTECT THE CIVIL RIGHTS OF ALL BORROWERS IN ACCORDANCE WITH FEDERAL LAW; THE FEDERAL GOVERNMENT REQUESTS THAT YOU PROVIDE THE FOLLOWING INFORMATION. IT WILL NOT BE CONSIDERED BY THIS LENDING INSTITUTION IN DECIDING WHETHER OR NOT TO MAKE A LOAN TO YOU, BUT IT MAY BE REVIEWED BY GOVERNMENT AUTHORITIES TO ASSURE FAIR TREATMENT OF ALL LOAN APPLICANTS.

This institution does not consider race, color, religion, or national origin in determining whether or not you should receive a loan.

Part I - To Be Completed by Applicant

YOUR COMPLETION OF THIS FORM IS COMPLETELY VOLUNTARY. IF YOU DECLINE TO FILL OUT THIS FORM, CHECK HERE _____ AND SIGN YOUR NAME AT THE END OF THIS FORM.

Please indicate race or ethnic descent:

American Indian	(I)	Applicant	(I)	Spouse or Other Applicant
Asian	(A)		(A)	
Black/Negro	(B)		(B)	
Spanish descent	(S)		(S)	
White, non-Spanish	(W)		(W)	
Other, specify	(O)		(O)	

If you fit more than one category, please check the one which you believe best describes you. "Spanish descent" includes persons of Puerto Rican, Cuban, Mexican and Central and South American descent.

If you have reason to believe that you have been denied a loan because of race, color, religion, or national origin, you have the right to file a complaint, containing relevant facts, including dates and your name, with:

Assistant Secretary for Equal Opportunity
Department of Housing and Urban Development
Washington, D. C. 20410

or your local Department of Housing and Urban Development or Federal Housing Administration office, or you may take any other appropriate action provided by law.

Signature of Applicant

Signature of Spouse or Other Applicant

PART II

To be completed by the lending institution only if the application is disapproved:

Date of decision

Reasons for disapproval

Officer

FORM C

THIS - C

FEDERAL HOME LOAN BANK BOARD

FAIR HOUSING INFORMATION STATEMENT

Disposition:

(Circle the appropriate lettered box)

[A] Approved [B] Denied [C] N/A

FHLBB Docket No. [] [] [] - []

State..... [] []

SWSA..... [] [] []

Tract..... [] [] [] [] [] [] [] []

Loan Application No. [] [] []

PART I: PERSONAL ECONOMIC DATA

Applicant's Name (last) (first) (middle)

Subject Property

Spouse's Name (last) (first) (middle)

Street Address

Address

City, State & Zip Code

City, State & Zip Code

For Items 1 through 8 circle the appropriate lettered box.)

1. Combined Gross Annual Income:

[A] \$0 - 5,000 [B] \$5,001 - 10,000 [C] \$10,001 - 15,000 [D] \$15,001 - 25,000
[E] Over \$25,000

2. Years at Present Occupation:

(A. Applicant)

[A] Not employed [B] Less than 1 Year [C] 1 Year [D] 2 Years
[E] 3 - 5 Years [F] Over 5 Years

(B. Spouse)

[A] Not employed [B] Less than 1 Year [C] 1 Year [D] 2 Years
[E] 3 - 5 Years [F] Over 5 Years

3. Amount of Combined Outstanding Debts:

[A] \$0 - 5,000 [B] \$5,001 - 10,000 [C] \$10,001 - 20,000 [D] \$20,001 - 35,000
[E] Over \$35,000

4. Combined Monthly Debt Payments:

[A] \$0 - 100 [B] \$101 - 200 [C] \$201 - 300 [D] \$301 - 500
[E] \$501 - 800 [F] Over \$800

5. Combined Assets:

[A] \$0 - 5,000 [B] \$5,001 - 10,000 [C] \$10,001 - 20,000 [D] \$20,001 - 30,000
 [E] \$30,001 - 60,000 [F] \$60,001 - 100,000 [G] Over \$100,000

6. Amount of Loan Requested:

[A] \$0 - 2,500 [B] \$2,501 - 5,000 [C] \$5,001 - 10,000 [D] \$10,001 - 15,000
 [E] \$15,001 - 25,000 [F] \$25,001 - 35,000 [G] \$35,001 - 45,000
 [H] \$45,001 - 60,000 [I] \$60,001 - 75,000 [J] Over \$75,000

7. Purchase Price of Subject Property:

[A] \$0 - 5,000 [B] \$5,001 - 10,000 [C] \$10,001 - 20,000 [D] \$20,001 - 30,000
 [E] \$30,001 - 50,000 [F] \$50,001 - 75,000 [G] Over \$75,000

8. Subject Property Will be Owner-Occupied:

[A] Yes [B] No

PART II: PERSONAL DESCRIPTIVE DATA

The Federal Government, not this institution asks you to provide the following information as part of its program to assure equal treatment of all citizens under the Civil Rights Act of 1968. You are advised that it is against the law for this institution to use your answers to deny you a loan.

1. Please circle the lettered box below which you believe best describes your ethnic identification: ("Spanish Descent" includes persons of Puerto Rican, Cuban, Mexican and Central and South American descent.)

[A] American Indian [B] Asian [C] Black/Negro [D] Spanish Descent
 [E] White/Caucasian [F] Other

2. Marital Status: (circle the appropriate lettered box.)

[A] Single [B] Married [C] Divorced [D] Widowed

3. Sex: (circle the appropriate lettered box.)

[A] Male [B] Female

PART III: DENIAL OR FAILURE TO SUBMIT

(To be filled in by institution only if loan is denied or written application is not submitted.)

- a. Date of denial by institution if written application has been submitted:

b. Reasons for decision or failure to submit written application:

APPLICANT COMPLETED:

Signature of Applicant _____ Date _____
 Part I Part II None
☐ ☐ ☐ ☐ ☐ ☐

OFFICER COMPLETED:

Signature of Interviewing Officer _____ Date _____
 Part I Part II None
☐ ☐ ☐ ☐ ☐ ☐

Signature of Officer Completing Part III _____ Date _____

[FR Doc.74-7544 Filed 4-1-74;8:45 am]

Title 33—Navigation and Navigable Waters
 CHAPTER II—CORPS OF ENGINEERS,
 DEPARTMENT OF THE ARMY
 PART 209—ADMINISTRATIVE
 PROCEDURE

Permits for Activities in Navigable Waters
 or Ocean Waters

On May 10, 1973, the Department of the Army, acting through the Chief of Engineers, published proposed regulations, which superseded regulations published in 33 CFR 209.120 and 209.130 and served as interim guidance to all Corps of Engineers installations. These proposed regulations prescribed the policy, practice and procedure to be followed by all Corps of Engineers installations and activities in connection with applications for permits authorizing structures and work in or affecting navigable waters of the United States pursuant to the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.), the discharge of dredged or fill material into navigable waters pursuant to section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), and the transportation of dredged material for the purpose of dumping it into ocean waters pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

The Department of the Army, acting through the Corps of Engineers, is publishing herewith the final regulations which prescribe the policies, practice and procedures to be followed in the processing of Department of the Army permits.

The public comment period for this regulation expired on 9 June 1973. This final regulation has been revised based on comments received from the general public, other Federal agencies, and Corps field offices as well as interpretative guidance received from recent judicial decisions. We wish to take this opportunity to express appreciation for these comments and suggestions.

The following analysis summarizes comments of particular significance which were received on the cited sections of the proposed regulations, and discusses the basis for the decisions which were made.

Section 209.120(c)(1). There was a comment that compliance with water quality standards is not required by section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341) (hereinafter referred to as FWPCA), and therefore deletion of the words "water quality standards" from the summary in paragraph (c)(1) of the provisions of section 401 requiring a State certification was recommended. The legislative history of the FWPCA was cited to support this position.

It is true that the main thrust of section 401 is on effluent limitations, and that general State water quality standards are not expressly included. However, the Conference substitute embodied in the final version of the law not only requires a State certification which sets forth "effluent limitations, and other limitations and monitoring requirements to insure compliance with sections 301,

302, 306 and 307" of the FWPCA, but also added language requiring certification of compliance with "any other appropriate requirement of State law which is set forth in the certification." This would include appropriate State water quality standards. Consequently we cannot agree to this recommended deletion.

Section 209.120(c)(5). On the recommendation of the Department of Commerce, we have rewritten this paragraph to better emphasize the role of the National Marine Fisheries Service under the Fish and Wildlife Coordination Act.

Section 209.120(c)(8) and (9). At the request of the Departments of Housing and Urban Development, and Commerce, respectively, two additional summary paragraphs have been added which recognize the interrelationship of this regulatory permit program with the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701, et seq.) and the Water Resources Planning Act (42 U.S.C. 1962, et seq.).

Section 209.120(d)(1). Several comments and questions were received concerning the different definitions which were assigned to the terms "navigable waters of the United States" and "navigable waters". In this regard, it is noted that the Corps regulatory authority under the River and Harbors Act of 1899 (33 U.S.C. 401 et seq.) speaks in terms of "navigable waters of the United States". This term has received the benefit of over 100 years of judicial definition and interpretation which has largely been based on the constitutional extent to which the authority of the United States can extend over the nation's waterways. Recognizing that the extent of Federal authority over the nation's waterways has been an evolutionary one and that recent judicial decisions have provided additional guidance and direction as to the scope and extent of this jurisdiction, the Corps recently undertook an extensive review of all of the judicial decisions in this area, and substantially revised and refined its administrative definition of this term to more accurately reflect and incorporate this judicial guidance. This revised definition, which was published in the FEDERAL REGISTER on September 9, 1972 (37 FR 18289) and has been subsequently included in the Code of Federal Regulations (33 CFR 209.260) asserts regulatory authority over many heretofore unregulated waterways, as well as establishing the geographical limits of this jurisdiction.

Section 404 of the FWPCA uses the term "navigable waters" which is later defined in the Act as "the waters of the United States." The Conference Report, in discussing this term, advises that this term is to be given the "broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report—to give it the broadest possible Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial

precedents have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial precedents which have reinforced it. Accordingly, we feel that in the administration of this regulatory program both terms should be treated synonymously.

Section 209.120(d)(3). The definition of "dredged material" has been revised to more accurately reflect the extent and type of activities which fall within the purview of this regulation.

Section 209.120(d)(4). Many comments expressed the concern that the definition of "fill material" was too restrictive in that it was limited only to the creation of fastland (e.g. land above the ordinary high water mark). The definition has been expanded to include planned elevation of lands beneath navigable waters.

Section 209.120(e)(1). This section has been expanded to include several additional types of activities for which Department of the Army authorization under the River and Harbor Act of 1899 will not be required. First, since this regulation requires an evaluation of the proposed plans for an entire residential development associated with the connection of an artificial canal to a navigable water of the United States including the anticipated proliferation of numerous docks and piers in those canals (see paragraph (g)(11)), it is felt that subsequent individual authorization of docks, piers and similar structures are not necessary. In addition, the harbor line "Grandfather" clause, which appears in 33 CFR 209.150 (ER 1145-2-304) and which provides that a permit will not be required under Section 10 of the River & Harbor Act of 1899 for work commenced or completed before May 27, 1970, shoreward of established harbor lines, has been incorporated into this regulation. However, since the 1972 enactment of the FWPCA has superseded, in part, this harbor line policy, provision has been made to exempt the discharge of dredged or fill material from its coverage.

Section 209.120(e)(3). Clarifying language has been added to subparagraph (ii) of this section to cover cases such as Section 26A of the Tennessee Valley Authority Act which exempts those activities by the Tennessee Valley Authority from the authorization requirements of the River and Harbor Act of 1899. Clarifying language has also been added to subparagraph (iii) of this section to emphasize that while Federal agencies are not required to obtain water quality certifications pursuant to section 401(a)(6) of the FWPCA, they are still required to comply with substantive State, interstate, and local water quality standards and effluent limitations involving the discharge of pollutants in the design, construction, management, operation and maintenance of their facilities. This position is further reflected in Executive Order No. 11752, dated December 17, 1973, which is published in 38 FR 34793.

Section 209.120(g)(2). In response to comments concerning the treatment of non-Federal dredging projects which are not considered and coordinated with a Federal navigation project, provision has been made to treat such cases on an individual basis utilizing the normal evaluation and administrative procedures set forth in this regulation.

Section 209.120(g)(3). Numerous comments were received which interpreted this section on wetlands as an expansion of jurisdiction beyond those waters regarded as navigable waters of the United States. In response to these comments, it should be noted that this section prescribes the policy to be followed in evaluating proposed activities in or affecting those wetlands which are regarded as navigable waters of the United States.

At the suggestion of the Environmental Defense Fund, the Soil Conservation Service has been included with those Federal agencies which the District Engineer may consult in assessing the cumulative effect of a proposed activity on wetlands since that Agency's watershed projects often involve activities in wetlands.

Section 201.120(g)(4). Paragraph (ii) of this section has been revised to more accurately reflect the provisions of the 1967 Memorandum of Understanding between the Secretaries of the Interior and Army. Procedures for those activities which do not fall within the purview of this memorandum have been prescribed in §§ 209.120(i) and 209.120(p).

Section 209.120(g)(5). Additional clarifying language has been added to this section to reflect the requirements of section 401(a)(1) of the FWPCA that a water quality certification address both the construction and operation of the proposed activity.

Section 201.120(g)(6). At the request of the Department of the Interior, National Wilderness Areas, Parks, and Monuments, and the National Registry of Natural Landmarks have been added to those lists of items which will receive specific application of the policies on historic, scenic, and recreational values expressed in this section.

Section 209.120(g)(7). Clarifying language has been added to subparagraph (ii) of this section to indicate when the procedures outlined in Chapter III, § 327.19 of Title 36, Code of Federal Regulations, will be applied for floating structures for small recreational boats or other recreational purposes in lakes owned and operated by the Corps of Engineers in lieu of the procedures specified in this regulation.

Section 209.120(g)(8). At the request of the U.S. Coast Guard, the provision pertaining to lighting of fishing structures and appliances has been reinserted as subparagraph (ii) of this section.

Section 209.120(g)(11). In conformance with the policy expressed in paragraph (e)(1) that permits will not be required for docks, piers, and other similar structures in canals after the connection to a navigable water has been authorized, provision has been made in subparagraph (ii) of this section to re-

quire a proponent of canal work to include in his submission of proposed plans for the development a description of anticipated docks, piers and other similar structures which will be placed in the canal.

Section 209.120(g)(12). The policies and procedures governing unauthorized activities as expressed in the proposed regulation provided for the District Engineer, upon discovery of an unauthorized activity, to issue a cease and desist order and instruct the party involved to immediately file for a permit. In addition, and after these instructions were issued, the District Engineer also had the responsibility of recommending appropriate legal action to be taken against these parties. The case of *U.S. v. Moretti*, 478 F.2d 418 (5th Cir. 1973) which was decided five days after publication of this proposed regulation, highlighted the problems which the Corps would experience in the enforcement of this regulatory program if these procedures were followed. Specifically, the *Moretti* case held that while a court has the authority to order appropriate action against unauthorized activities, including restoration of the area to its original condition, it cannot do so until the Corps of Engineers has fully processed and made a decision on a permit application for this unauthorized work. In reaching this decision, the *Moretti* court noted that the Corps regulations provide a party involved in an unauthorized activity with the right to apply for a permit after discovery of same.

The procedures involving unauthorized activities have been changed to reflect the rationale of the *Moretti* decision, and to avoid the obvious adverse impact which adherence to the originally proposed procedures would have on the enforcement of this regulatory program. These new procedures now provide for the District Engineer, upon discovery of an unauthorized activity, to issue a cease and desist order and to immediately commence an investigation of the unauthorized activity. Except in cases where the unauthorized activity was performed in nontidal waters prior to an administrative, judicial or legislative determination that the water is a navigable water of the United States, the District Engineer is not authorized to process or accept for process any permit application. Instead, he is now required to prepare a report to be forwarded to the Chief of Engineers which will contain an analysis of the data and information obtained during his investigation and will recommend appropriate civil and criminal action. Provision has also been made for direct referrals of cases to local U.S. Attorneys where there is intentional disregard of cease and desist orders issued for ongoing unauthorized activities or where the unauthorized activity is minor, has not had a significant impact on the environment, and would have encountered no opposition if a permit had been sought. All other cases requiring judicial action will continue to be processed through administrative chan-

nels to insure a coordinated and uniform enforcement effort.

Section 209.120(g)(14). At the suggestion of Consolidated Edison, the word "aerial," which qualified this section on power transmission lines, has been deleted in order that other types of transmission lines including those under water can be included within these policy provisions. A comment was also received which alleged that the minimum clearance requirements prescribed by this section were excessive. We have again reviewed these minimum clearances and feel that they are still appropriate.

Section 209.120(g)(17). Comments were received concerning the apparent duplication of effort which occurs when EPA is notified of a proposed action both during the public notice and 15 days before the intended issuance of a permit under section 404 of the FWPCA. This latter notification requirement is required by statute, and is made further necessary because the Corps of Engineers never operates on the assumption that a permit will be issued after an application is received. Instead, it evaluates the proposed work in light of all comments received, and may require alterations to the proposed plans as a condition to issuance of the permit. Thus, since the circumstances surrounding the final issuance of a permit, including the conditions under which the work will be performed, may be altogether different from the initial description of the work in the public notice, EPA must be afforded the additional opportunity to evaluate the final contemplated action in exercising its responsibilities under section 404 of the FWPCA.

The criteria for ocean dumping sites was published by EPA in the *FEDERAL REGISTER* on October 15, 1973 (38 FR 28621). When ultimately published in the Code of Federal Regulations they will be located in Title 40, Chapter 1, Part 220. As of this printing, EPA has not promulgated guidelines under section 404 of the FWPCA.

Section 209.120(h)(1). Several comments were received concerning the adequacy and possible changes to ENG Form 4345 (application form). The Corps is preparing a revised ENG Form 4345 which will reflect these comments.

Section 209.120(h)(2)(iii). Fees for permit application involving fill behind retaining structures will be required in accordance with this section.

Section 209.120(h)(2). At the suggestion of the Environmental Protection Agency and the Department of the Interior, a description of the location and dimensions of adjacent structures to the proposed activity will be included in the application to assist these agencies in their overall evaluation of the proposed activity. In addition, a further change in this section has been made to require an applicant to submit a list of all approvals required for the proposed activity including those for which approvals or denials have already been made.

Section 209.120(h)(a)(vi). Pursuant to the congressional intent expressed in 31 U.S.C. 483(a) that permit programs of this type be self-sustaining to the fullest extent possible, provision has been made for the assessment of expenses involved in the preparation of an environmental impact statement in those cases where these expenses will become substantial. However, in lieu of this procedure, the District Engineer is authorized to request the applicant to enter into a third party contract to obtain the necessary data for the preparation of an environmental impact statement. It should be emphasized that notwithstanding the expense which the applicant may incur as a result of the preparation of an environmental impact statement, there is no assurance that a permit will ultimately be issued.

Section 209.120(i)(1)(iv). Clarifying language has been inserted to cover those situations in which another Federal agency has the primary responsibility for authorizing or undertaking a proposed activity and has prepared an environmental impact statement which covers the portion of the activity for which a Corps of Engineers permit is sought.

Section 209.120(j)(1)(iv). At the requests of the Departments of the Interior and Commerce, and the Environmental Protection Agency, this subparagraph has been changed to provide more precise information in the public notice for review and evaluation purposes.

Section 209.120(l). Several comments were received which challenged the guidance on the extent of coverage of an environmental impact statement for a permit action as specified by this section. The requirements of this section follow the guidelines promulgated by the Council on Environmental Quality on 1 August 1973 (38 FR 20550-20562). In particular, note that § 1500.8(a) specifically requires consideration of the probable impact of the proposed action on the environment including secondary or indirect, as well as the primary and direct consequences of the proposed activity.

Section 209.120(p)(1). Clarifying language has been inserted which would authorize District Engineers to deny permit applications where required State or local certifications have been denied.

Section 209.120(p)(2). Changes have been made to this section which would authorize Division Engineers to issue permits over the unresolved objections of other Federal agencies upon completion of certain specified procedures. This approach is designed to further decentralize the permit evaluation and decision responsibilities and enable effective and expeditious resolution of Federal objections to proposed actions without encountering the often protracted procedures experienced in the automatic referral or cases to the headquarters' levels of the various Federal agencies. Division Engineers have not been authorized, by these changes, to disregard those procedures outlined in statutes and memoranda of understanding which cover particular types of situations, and those

procedures must still be followed when the case arises.

Section 209.120(g). Several comments were received concerning the availability of EPA's enforcement authority under section 209 of the FWPCA and section 105 of the Marine Protection, Research and Sanctuaries Act of 1972. Incorporation of those enforcement provisions will be made in a separate regulation dealing with the Corps of Engineers enforcement program which will be published at a later date.

This regulation is effective on April 3, 1974.

Dated: April 1, 1974.

J. L. KELLY,
Brigadier General, USA,
Acting Director of Civil Works.

LIST OF COMMENTS ON REGULATIONS FOR PERMITS FOR ACTIVITIES IN NAVIGABLE WATERS OR OCEAN WATERS

1. Honorable Henry S. Reuss, Chairman, Conservation and Natural Resources Subcommittee, House of Representatives.
2. Department of Housing and Urban Development, Washington, D.C.
3. Department of Commerce, Washington, D.C.
4. Environmental Protection Agency, Washington, D.C.
5. House of Representatives, State of Washington, Spokane, Wash.
6. Miss Zeva L. Smith, San Francisco, Calif.
7. Save Our Bay Association, Berkeley, Calif.
8. Miss Virginia M. Matheny, Corte Madera, Calif.
9. Stone and Youngberg Investment Securities, San Francisco, Calif.
10. Ms. Shirley West, Corte Madera, Calif.
11. Mrs. Patricia Foncault, Redwood City, Calif.
12. Maryland Port Administration, Baltimore, Md.
13. U.S. Coast Guard, Washington, D.C.
14. Debevoise and Liberman, Washington, D.C.
15. Ms. Jeanne M. Lippay, San Francisco, Calif.
16. National Association of Manufacturers, New York, N.Y.
17. Edison Electric Institute, New York, N.Y.
18. American Electric Power Service Corp., New York, N.Y.
19. Transcontinental Gas Pipeline Corp., Houston, Tex.
20. American Land Title Association, Washington, D.C.
21. California Land Title Association, Sacramento, Calif.
22. Department of the Interior, Washington, D.C.
23. Texaco, Inc., Washington, D.C.
24. Pillsbury, Madison and Sutro, San Francisco, Calif.
25. Port of Corpus Christi, Corpus Christi, Tex.
26. Columbia Gas System Service Corp., Wilmington, Del.
27. Landels, Ripley, and Diamond, San Francisco, Calif.

28. Natural Resources Defense Council, Inc., Washington, D.C.
29. Florida Audubon Society, Maitland, Fla.
30. Environmental Defense Fund, East Setauket, N.Y.
31. Title Insurance and Trust Co., Los Angeles, Calif.
32. Offshore Operators Committee, New Orleans, La.
33. Eugene V. Coan, Ph. D., Palo Alto, Calif.
34. Maryland Environmental Trust, Baltimore, Md.
35. Louisiana Power and Light Co., New Orleans, La.
36. State of Ohio Environmental Protection Agency, Columbus, Ohio.
37. Environmental Law Station, Tallahassee, Fla.
38. Consolidated Edison Co., New York, N.Y.
39. Assistant to the Governor on Natural Resources, State of Oregon, Salem, Oreg.
40. Standard Oil Company of California, San Francisco, Calif.
41. Department of Transportation, State of Maryland, Baltimore, Md.
42. Potomac Electric Power Co., Washington, D.C.
43. Brisbane Citizens for Civic Progress, Brisbane, Calif.
44. Tennessee Valley Authority, Knoxville, Tenn.
45. Robert O. Delzell, Burlingame, Calif.
46. Save San Francisco Bay Association, Berkeley, Calif.
47. Getty Oil Co., New Orleans, La.
48. Mr. Don H. Adams, Corte Madera, Calif.
49. Mr. B. Abbel, Mill Valley, Calif.
50. League of Women Voters of the Bay Area, Lafayette, Calif.
51. Mrs. Patricia L. Dresel, Greenbrae, Calif.
52. Mr. and Mrs. Francis Strauss, Mill Valley, Calif.
53. Sierra Club, Palo Alto, Calif.
54. Tropical Audubon Society, Inc., Miami, Fla.
55. Mrs. Barbara Shockley, San Lorenzo, Calif.
56. Mrs. Alfred Kraeger, Corte Madera, Calif.
57. Ms. Anne Tamimi, Corte Madera, Calif.
58. Mrs. Ruth Lee Blankenstein, New Orleans, La.
59. Mrs. Herbert Briggs, Geoffrey Barrett, David Baum, Alta Fly, Mrs. Thomas Stone, Mill Valley, Calif.
60. Environmental Systems Industries, Irvine, Calif.
61. Open Space Committee, Corte Madera, Calif.
62. Donald R. Kogut, Mill Valley, Calif.
63. Clell E. Harris, Corte Madera, Calif.
64. Mr. and Mrs. Ellis C. Anderson, Corte Madera, Calif.
65. Mr. and Mrs. William G. Gordon, Corte Madera, Calif.
66. Edison Electric Institute, New York, N.Y.
67. Mrs. Gilbert Tunnison, Corte Madera, Calif.
68. F. Gentry Harris, MD., Greenbrae, Calif.
69. Mr. and Mrs. Pesley N. Ford, Alameda, Calif.
70. Ms. Judith Horne, Corte Madera, Calif.
71. The City Attorney, Long Beach, Calif.

§ 209.120 Permits for Activities in Navigable Waters or Ocean Waters.

(a) *Purpose.* This regulation prescribes the policy, practice, and procedure to be followed by all Corps of Engineers installations and activities in connection with applications for permits authorizing structures and work in or affecting navigable waters of the United States, the discharge of dredged or fill material into navigable waters, and the transportation of dredged material for the purpose of dumping it into ocean waters.

(b) *Laws Requiring Authorization of Structures or Work.* (1) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act on October 16, 1966 (80 Stat. 941, 49 U.S.C. 1165g(6) (A)).

(2) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters are unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)).

(3) Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Regulations (ER 1145-2-304) have been promulgated relative to this authority and published at § 209.150. By policy stated in those regulations effective May 27, 1970,

harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Except as provided in paragraph (e) (1) of this section below, permits for work shoreward of those lines must be obtained in accordance with section 10 of the same Act, cited above.

(4) Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency, under sections 402 and 405 of the Federal Water Pollution Control Act (PL 92-500, 86 Stat. 816, 33 U.S.C. 1342 and 1345).

(5) Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(6) Section 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river at their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and the Chief of Engineers. The instrument of authorization is designated a permit.

(7) Section 404 of the Federal Water Pollution Control Act (PL 92-500, 86 Stat. 816, 33 U.S.C. 1344) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites. The selection of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas, wildlife or recreational areas.

(8) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (PL 92-532, 86 Stat. 1052, 33 U.S.C. 1413) authorizes the Secretary of the Army to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. However, similar to the EPA Administrator's limiting authority cited in paragraph (b) (7) of this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas.

(9) The New York Harbor Act of June 29, 1888, as amended (33 U.S.C. 441 et seq.) provides for the issuance of permits by the Supervisors of the New York, Baltimore, and Hampton Roads Harbors for the transportation upon and/or discharge in those harbors of a variety of materials including dredgings, sludge and acid. The District Engineers of New York, Baltimore and Norfolk have been designated the Supervisors of these harbors, respectively. However, section 511 (b) of the Federal Water Pollution Control Act (PL 92-500, 86 Stat. 816) provides that the discharge of these materials into navigable waters shall be regulated pursuant to that Act and not the New York Harbor Act except as to the effect on navigation and anchorage. In addition, section 106(a) of the Marine Protection, Research and Sanctuaries Act of 1972 (PL 92-532, 86 Stat. 1052) provides that all permits for discharges in ocean waters shall only be issued in accordance with the Act after April 23, 1973. Therefore, the supervisors of these three harbors will no longer issue permits under the authority of the New York Harbor Act, as amended, for transportation and/or discharge of these materials.

(c) *Related Legislation.* (1) Section 401 of the Federal Water Pollution Control Act (PL 92-500; 86 Stat. 816, 33 U.S.C. 1411) requires any applicant for a Federal license or permit to conduct any activity which may result in a discharge into navigable waters to obtain a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(2) Section 307(c) (3) of the Coastal Zone Management Act of 1972 (PL 92-583, 86 Stat. 1280, 16 U.S.C. 1456(c) (3)) requires any applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred

with the applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program.

(3) Section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972 (PL 92-532, 86 Stat. 1052, 16 U.S.C. 1432) authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(4) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations * * *." See also paragraph (1) (1) of this section on environmental statements.

(5) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, et seq.), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the concern of Congress with the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal Agency which proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(6) The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Federal Power Commission (FPC) to issue licenses

for the construction, operation and maintaining of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping in ocean waters, Department of the Army permits under section 404 of the Federal Water Pollution Control Act, or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 will be required.

(7) The National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places.

(8) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision unless the purchaser is furnished in advance a printed property report including information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is in a wetlands area, the report is required by Housing and Urban Development regulation to state that no permit has been granted by the Corps of Engineers for the development under Section 10 of the River Harbor Act of 1899.

(9) The Water Resources Planning Act (42 U.S.C. 1962 et seq.) provides for the possible establishment upon request of the Water Resources Council or a State of river basin water and related land resources commissions. Each such commission shall coordinate Federal, State, interstate, local and nongovernmental plans for the development of water and related land resources in its area, river basin, or group of river basins. In the event the proposed Corps of Engineers permits to non-governmental developers or other agencies under section

10 of the River and Harbor Act of 1899 and section 404 of the Federal Water Pollution Control Act may affect the plans of such river basin commissions, the permits will be coordinated with the appropriate concerned river basin commissions. The same is true of Corps of Engineers authorizations to private persons or corporations to improve navigable rivers at their own expense under section 1 of the River and Harbor Act of 1902.

(d) Definitions. For the purpose of issuing or denying authorizations under this regulation:

(1) The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 CFR 209.260 for a more complete definition of these terms).

(2) The term "ocean waters," as defined in the Marine Protection Research and Sanctuaries Act of 1972 (PL 92-532, 86 Stat. 1052), means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(3) The term "dredged material" means any material excavated or dredged from navigable waters of the United States including any runoff or overflow which occurs during a dredging operation or from a contained land or water disposal area.

(4) The term "fill material" means any material deposited or discharged into navigable waters which may result in creating fastlands or other planned elevations of lands beneath navigable waters.

(5) The term "person" means any individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, any interstate body, or any agency or instrumentality of the Federal Government.

(6) The term "coastal zone" means the coastal waters and adjacent shorelands designated by a State as being included in its approved coastal zone management program under the Coastal Zone Management Act of 1972.

(e) Activities Requiring Authorizations. (1) Department of the Army authorizations are required under the River and Harbor Act of 1899 (See paragraph (b), of this section) for all structures or work in navigable waters of the United States except for bridges and causeways (see Appendix A), the placement of aids to navigation by the U.S. Coast Guard, structures constructed in artificial canals within principally residential developments where the canal has been connected to a navigable water of the United States (See paragraph (g)(11) of this section), and activities which were commenced or completed shoreward of established harbor lines before May 27, 1970 (See § 209.150) other than those activi-

ties involving the discharge of dredged or fill material in navigable waters after October 18, 1972.

(i) Structures or work are in the navigable waters of the United States if they are within limits defined in § 209.260. Structures or work outside these limits are subject to the provisions of law cited in paragraph (b) of this section if these structures or work affect the course, location, or condition of the waterbody in such a manner as to significantly impact on the navigable capacity of the waterbody. A tunnel or other structure under a navigable water of the United States is considered to have a significant impact on the navigable capacity of the waterbody.

(ii) Structures or work licensed under the Federal Power Act of 1920 do not require Department of the Army authorizations under the River and Harbor Act of 1899 (See paragraphs (b) and (c) of this section); provided, however, that any part of such structures or work which involves the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping it into ocean waters will require Department of the Army authorization under section 404 of the Federal Water Pollution Control Act and section 103 of the Marine Protection, Research and Sanctuaries Act, as appropriate.

(2) In addition, Department of the Army authorizations will be required for the discharge of dredged or fill material into the navigable waters, for the transportation of dredged material for the purpose of dumping it into ocean waters, and for artificial islands and fixed structures on the outer continental shelf.

(3) Except as specifically provided in this subparagraph, activities of the type described in paragraph (e)(1) and (2) of this section done by or on behalf of any Federal agency, other than the Civil Works activities of the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers do not constitute authorization under this regulation. Division and District Engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(i) By section 10 of the Act of March 3, 1899 (see subparagraph b(2), above) Congress has delegated to the Secretary of the Army and the Chief of Engineers the duty of authorizing or prohibiting certain work or structures in navigable waters of the United States. The general legislation by which Federal agencies are empowered to act generally is not considered to the sufficient authorization by Congress to satisfy the purposes of section 10. If an agency asserts that it has Congressional authorization meeting the test of section 10 or would otherwise be exempt from the provisions of section 10, the legislative history and/or provisions of the Act should clearly demon-

strate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(ii) The policy provisions set out in paragraph (f)(4) of this section, relating to State or local authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive State, interstate, and local water quality standards and effluent limitations adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended, in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17, Dec. 73). They are not required, however, to obtain and provide certification of compliance with effluent limitations and water quality standards from State or interstate water pollution control agencies in connection with activities involving discharges into navigable waters.

(f) *General Policies for Evaluating Permit Applications.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed structure or work and its intended use on the public interest. Evaluation of the probable impact which the proposed structure or work may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process (e.g., see § 209.400, *Guidelines for Assessment of Economic, Social and Environmental Effects of Civil Works Projects*). That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use classifications, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) the relative extent of the public and private need for the proposed structure or work;

(ii) the desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;

(iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited; and

(iv) the probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

(3) As a matter of policy, permits will not be issued where authorization of the proposed work is required by State and/or local law and that authorization has been denied. However, initial processing of an application for a Department of the Army permit will proceed until definitive action has been taken by the responsible State or local body to grant or deny authorization. Where the required State and/or local authorization has been denied and procedures for reconsideration exist, reasonable time not to exceed 90 days will be allowed for the applicant to attempt to resolve the problem and/or obtain reconsideration of the denial. If the State or local denial of authorization cannot be thus resolved, the application will be denied in accordance with paragraph (p) of this section.

(i) Where authorized State, Regional or local land use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest.

(ii) Even if official authorization is not required by State and/or local law, but an affected State, regional or local agency comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(g) *Policies on Particular Factors of Consideration.* In applying the general policies cited above to the evaluation of a permit application, Corps of Engineers officials will also consider the following policies when they are applicable to the specific application:

(1) *Interference with Adjacent Properties or Water Resource Projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(i) (a) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, the District Engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require un-

due use of government resources. A significant probability of resulting damage to nearby properties can be a basis for denial of an application.

(b) A landowner's general right of access to navigable waters is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration.

(ii) (a) Where it is found that the work for which a permit is desired may interfere with a proposed civil works project of the Corps of Engineers, the applicant and the party or parties responsible for fulfillment of the requirements of local cooperation should be apprised in writing of the fact and of the possibility that a civil works project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. They should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

(b) Proposed activities which are in the area of a civil works project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(2) *Non-Federal Dredging for Navigation.* (i) The benefits which an authorized Federal navigation project is intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging an access channel to dock and berthing facilities or deepening such a channel to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, State, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with paragraph (f) of this section. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations will contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained, disposal areas will be in

accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values. (See also paragraph (g)(17) of this section.)

(ii) A permit for the dredging of a channel, slip, or other such project for navigation will also authorize the periodic maintenance dredging of the project. Authority for maintenance dredging will be subject to revalidation at regular intervals to be specified in the permit. Revalidation will be in accordance with the procedures prescribed in paragraph (n)(5) of this section. The permit, however, will require the permittee to give advance notice to the District Engineer each time maintenance dredging is to be performed.

(3) *Effect on Wetlands.* (i) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(ii) Wetlands considered to perform functions important to the public interest include:

(a) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(b) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(c) Wetlands contiguous to areas listed in paragraph (g)(3)(ii) (a) and (b) of this section, the destruction or alteration of which would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics of the above areas;

(d) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands often include barrier beaches, islands, reefs and bars;

(e) Wetlands which serve as valuable storage areas for storm and flood waters; and

(f) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected.

(iii) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and

interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas, in response to new applications, and in consultation with the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(iv) Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important by subparagraph (ii), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (f) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.

(a) In evaluating whether a particular alteration is necessary, the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether feasible alternative sites are available.

(b) The applicant must provide sufficient data on the basis of which the availability of feasible alternative sites can be evaluated.

(v) In accordance with the policy expressed in paragraph (f)(3) of this section, and with the Congressional policy expressed in the Estuary Protection Act, PL 90-454, state regulatory laws or programs for classification and protection of wetlands will be given great weight. (See also paragraph (g)(18) of this section).

(4) *Fish and Wildlife.* (i) In accordance with the Fish and Wildlife Coordination Act (see paragraph (c)(5) of this section) Corps of Engineers officials will in all permit cases, consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their loss and damage due to the work or structures proposed in a permit application (see paragraphs (i)(1)(ii) and (j)(2) of this section). They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(ii) The Division Engineer may issue a permit over an unresolved objection based on fish and wildlife considerations by the regional representative of Federal fish and wildlife agencies unless otherwise directed by the Chief of Engineers; provided, however, that the policies and

procedures stated in the Memorandum of Understanding between the Department of the Army and the Department of the Interior (Appendix B) will be followed with respect to all activities involving dredging, excavation, filling and other related work.

(5) *Water Quality.* (i) Applications for permits for activities which may affect the quality of navigable waters will be evaluated with a view toward compliance with applicable effluent limitations and water quality standards during both the construction and operation of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Federal Water Pollution Control Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration. If the certification provided is to the effect that no effluent limitation and water quality standards have been established as applicable to the proposed activity, or if certification is not required for the proposed activity, the advice of the Regional Administrator, EPA, on water quality aspects will be given great weight in evaluating the permit application. Any permit issued may be conditioned to implement water quality protection measures.

(ii) If the Regional Administrator, EPA, objects to the issuance of a permit on the basis of water quality considerations and the objection is not resolved by the applicant or the District Engineer, and the District Engineer would otherwise issue the permit, the application will be forwarded through channels to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. (See also paragraphs (b) (7) and (b) (8), above, and (g) (17) and (i) (2) (i) of this section.)

(6) *Historic, Scenic, and Recreational Values.* (i) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications (see paragraph (f) (3) of this section), or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(ii) Specific application of the policy in paragraph (g) (6) (i) of this section, applies to:

(a) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.), and those proposed for inclusion as provided by sec-

tions 4 and 5 of the Act, or by later legislation.

(b) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (83 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed in the National Register of Historic Places. Comments regarding such undertakings shall be sought and considered as provided by paragraph (i) (2) (iii) of this section.

(c) Sites included in the National Registry of Natural Landmarks which are published periodically in the *FEDERAL REGISTER*.

(d) Any other areas named in Acts of Congress or Presidential Proclamations as National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, and such areas as may be established under Federal law for similar and related purposes, such as estuarine and marine sanctuaries.

(7) *Structures for Small Boats.* As a matter of policy, in the absence of overriding public interest, favorable consideration will be generally be given to applications from riparian proprietors for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District Engineers will inform applicants of the hazards involved and encourage safety in location, design and operation. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor use facilities.

(i) Letters transmitting permits for structures for small boats will, where applicable, include the following language: "Notice is hereby given that a possibility exists that the structure permitted may be subject to damage by wave wash from passing vessels. Your attention is invited to special condition _____ of the permit." The appropriate designation of the permit condition placing responsibility on the permittee and not on the United States for integrity of the structure and safety of boats moored thereto will be inserted.

(ii) Floating structures for small recreational boats or other recreational purposes in lakes owned and operated by the Corps of Engineers under a Resources Manager are normally subject to permit authorities cited in paragraph (b), above when those waters are regarded as navigable waters of the United States. (See 33 CFR 209.260). However, such struc-

tures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in Chapter III, Part 327.19 of Title 36, Code of Federal Regulations if the land surrounding those lakes is under complete Federal ownership. District Engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake Resources Manager's office.

(8) *Aids to Navigation.* (1) The placing of non-Federal fixed and floating aids to navigation in a navigable water of the United States is within the purview of section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. Applications for permits for installation of aids to navigation will, therefore, be coordinated with the appropriate District Commander, U.S. Coast Guard, and permits for such aids will include a condition to the effect that the permittee will conform to the requirements of the Coast Guard for marking, lighting, etc. Since most fixed and floating aids to navigation will not ordinarily significantly affect environmental values, the usual form of authorization to be used will be a letter of permission.

(ii) Fishing structures and appliances in navigable waters of the United States will be lighted for the safety of navigation as follows: Lights will be displayed between sunset and sunrise. They will be placed at each end of the structure, except where the inner end terminates at such a point where there could be no practicable navigation between it and the high-water line of the adjacent coast. In such case no inner light will be required. The outer light will be white, and the inner light will be red. The size, capacity, and manner of maintenance of the lights will be specified in the Department of the Army permit authorizing the erection of the structure or appliances. When several structures or appliances are placed on one line with no navigable passage between them, they will be considered for lighting purposes as one structure.

(9) *Outer Continental Shelf.* Artificial islands and fixed structures located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands or structures are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria (see paragraph (j) (1) (viii) (b) of this section).

(10) *Effect on Limits of the Territorial Sea.* Structures or work affecting coastal waters may modify the coast line or baseline from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or low-tide elevations off shore. (See the Submerged Lands Act, 67 Stat. 29, U.S. Code section 1301(c), and *United States v. California*, 381 U.S. 139 (1965), 382 U.S. 448 (1966)). All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or baseline might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision in the application will be made by the Secretary of the Army after coordination with the Attorney General.

(11) *Canals and Other Artificial Waterways Connected to Navigable Waters.*

(i) A canal or similar artificial waterway is subject to the regulatory authorities discussed in paragraph (b) (2) of this section if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, condition, or capacity. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of this regulation. For all other canals the exercise of regulatory authority is restricted to those activities which affect the course, condition, or capacity of the navigable waters of the United States. Examples of the latter may include the length and depth of the canal; the currents circulation, quality and turbidity of its waters, especially as they affect fish and wildlife values; and modifications or extensions of its configuration.

(ii) The proponent of canal work should submit his application for a permit, including a proposed plan of the entire development, and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal, to the District Engineer before commencing any form of work. If the connection to navigable waters of the United States has already been made without a permit, the District Engineer will proceed in accordance with

paragraph (g) (12) (i) of this section. Where a connection has not yet occurred, but canal construction is planned or has already begun, the District Engineer will, in writing, advise the proponent of the need for a permit to connect the canals to navigable waters of the United States. He will also ask the proponent if he intends to make such a connection and will request the immediate submission of the plans and permit application if it is so intended. The District Engineer will also advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and that the existence of partially-completed excavation work will not be allowed to weigh favorably in evaluation of the permit application.

(12) *Unauthorized Activities.* The following procedures will be followed with respect to activities which are performed without proper authorization.

(i) When the District Engineer becomes aware of any unauthorized activity which is still in progress, he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. In appropriate cases, the District Engineer may also order interim protective measures to be taken in order to protect the public interest. If there is noncompliance with this cease and desist order, the District Engineer shall forward a factual report immediately to the local U.S. Attorney with a request that a temporary restraining order and/or preliminary injunction be obtained against the responsible persons.

(ii) In all cases, the District Engineer shall commence an immediate investigation to ascertain the facts surrounding the unauthorized activity. In making this investigation, the District Engineer shall solicit the views of appropriate Federal, State and local agencies, and shall request the persons involved in the unauthorized activity to provide appropriate information on this activity which will assist him in evaluating the activity and recommending the course of action to be taken. The District Engineer shall evaluate the information and views developed during this investigation in conjunction with the factors and criteria cited in paragraph (f) of this section and shall formulate recommendations as to the appropriate administrative and/or legal action to be taken, subject to the following:

(a) Except where the activity was performed in nontidal waters prior to an administrative, judicial or legislative determination that the water is a navigable water of the United States, the District Engineer is not authorized to process or accept for processing any permit application received.

(1) The District Engineer shall in all cases other than those covered by paragraph (g) (12) (ii) (a) (2) of this section prepare and forward a report to the Chief of Engineers, ATTN: DAEN-GCK, which shall contain an analysis of the data and information obtained during this investigation and recommend appropriate civil and criminal action. In those

cases where the analysis of the facts developed during his investigation, when made in conjunction with the factors and criteria in paragraph (f) of this section leads to the preliminary conclusion that removal of the unauthorized activity is in the public interest, the District Engineer shall also recommend restoration of the area to its original condition.

(2) In those cases to which the provisions of paragraph (m) (3), below, apply, the District Engineer may refer the matter directly to the local United States Attorney for appropriate legal action.

(b) If criminal and/or civil action is instituted against the responsible person, the District Engineer shall not accept for processing any application until final disposition of all judicial proceedings, including the payment of all prescribed penalties and fines and/or the completion of all work ordered by the court. Thereafter, the District Engineer may accept an application for a permit; Provided, that with respect to any judicial order requiring partial or total restoration of an area, the District Engineer, if so ordered by the court, shall supervise this restoration effort and may allow the responsible persons to apply for a permit for only that portion of the unauthorized activity for which restoration has not been so ordered.

(c) In those cases where the District Engineer determines that the unauthorized activity was performed in nontidal waters, prior to an administrative, judicial or legislative determination that the water is a navigable water of the United States, the District Engineer shall instruct the responsible persons to immediately file for a permit, unless he determines on the basis of all the facts and circumstances that immediate legal action is warranted. In such cases, the District Engineer will follow the procedures of paragraph (g) (12) (ii) (a) and (b) of this section.

(iii) Processing and evaluation of applications for after-the-fact authorizations for activities undertaken without the required Department of the Army authorizations will in all other respects follow the standard procedures of this regulation. Thus, authorizations may still be denied in accordance with the policies and procedures of this regulation.

(iv) Where after-the-fact authorization in accordance with this paragraph is determined to be in the public interest, the standard permit form for the activity will be used, omitting inappropriate conditions, and including whatever special conditions the District Engineer may deem appropriate to mitigate or prevent undesirable effects which have occurred or might occur.

(v) Where after-the-fact authorization is not determined to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished and establish a reasonable period of time for the applicant to complete such actions.

The District Engineer, after denial of the permit, will again consider whether civil or criminal action is appropriate.

(vi) If the applicant declines to accept the proposed permit conditions, or fails to take corrective action prescribed in the notification of denial, or if the District Engineer determines, after denying the permit application, that legal action is appropriate, the matter will be referred to the Chief of Engineers, ATTN: DAEN-GCK, with recommendations for appropriate action.

(vii) Applications will generally not be required for work or structures completed before 18 December 1968, nor where potential applicants had received expressions of disclaimer prior to the date of this regulation; *provided, however*, That the procedures of paragraph (g) (12) (i) of this section shall apply to all work or structures which were commenced or completed on or after 18 December 1968, and may be applied to all specific cases, regardless of date of construction or previous disclaimers, for which the District Engineer determines that the interests of navigation so require.

(13) *Facilities at the Borders of the United States.* (i) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(a) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a foreign country, must be made to the Federal Power Commission. (See Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a) (e), 15 U.S.C. 717b, and 18 CFR Parts 32 and 153).

(b) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (See Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.767).

(c) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (1) pipelines, conveyors belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; (2) facilities for the exportation or importation of water or sewage to or from a foreign country; (3) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (See Executive Order 11423, August 16, 1968).

(ii) A Department of the Army permit under Section 10 of the River and Harbor Act of March 3, 1899 is also required for all of the above facilities which affect the navigable waters of the United States,

but in each case in which a permit has been issued as provided above, the decision whether to issue the Department of the Army permit will be based primarily on factors of navigation, since the basic existence and operation of the facility will have been examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in navigable waters or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate Department of the Army authorizations under section 404 of the Federal Water Pollution Control Act or under section 103 of the Marine Protection Research and Sanctuaries Act of 1972 are also required. Evaluation of applications for these authorizations will be in accordance with paragraph (g) (17) of this section.

(14) *Power Transmission Lines.* (i) Permits under section 10 of the River and Harbor Act of March 3, 1899, (33 U.S.C. 403) are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Federal Power Commission under the Federal Water Power Act of 1920 (16 U.S.C. 797). If an application is received for a permit for lines which are part of a water power project, the applicant will be instructed to submit his application to the Federal Power Commission. If the lines are not part of a water power project, the application will be processed in accordance with the procedures prescribed in this regulation.

(ii) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage, kV:	Minimum additional clearance (ft.) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750-765	45

(15) *Seaplane Operations.* Structures in navigable waters of the United States associated with seaplane operations require Department of the Army permits,

but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(i) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, District Engineer, and other interested parties as to the effects of the proposal on the use of airspace. The District Engineer will therefore refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to their recommendations when evaluating the general public interest.

(ii) If the seaplane base will serve air carriers licensed by the Civil Aeronautics Board, the applicant must receive an airport operating certificate from the FAA. That certificate reflects determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the District Engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(16) *Foreign Trade Zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. sections 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the District Engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of this regulation. Evaluation by a District Engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

(17) *Discharge of Dredged or Fill Material in Navigable Waters or Dumping of Dredged Material in Ocean Waters.* (i) Applications for permits for the discharge of dredged or fill material into navigable waters at specific disposal sites will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b) of the Federal Water Pollution Control Act. If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site in navigable waters will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(ii) Applications for permits for the transporting of dredged material for the purpose of dumping it into ocean waters will be evaluated to determine that the proposed dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. In making the evaluation, Corps of Engineers officials will apply criteria established by the Administrator, EPA, under authority of section 102 (a) of the Marine Protection, Research and Sanctuaries Act of 1972, and will specify the dumping sites, using the recommendations of the Administrator, pursuant to section 102(c) of the Act, to the extent feasible. (See 40 CFR Part 220). In evaluating the need for the dumping as required by paragraph (f) (2) (i) of this section, Corps of Engineers officials will consider the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of the United States.

(iii) Sites previously designated for use as disposal sites for discharge or dumping of dredged material will be specified to the maximum practicable extent in permits for the discharge or dumping of dredged material in navigable waters or ocean waters unless restricted by the Administrator, EPA, in accordance with section 404(c) of the Federal Water Pollution Control Act or section 102(c) of the Marine Protection, Research, and Sanctuaries Act of 1972.

(iv) Prior to actual issuance of permits for the discharge or dumping of dredged or fill material in navigable or ocean waters, Corps of Engineers officials will advise appropriate Regional Administrators, EPA, of the intent to issue permits. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with paragraph (s), below, for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain an analysis for a determination by the Secretary of the Army that there is no economically feasible method or site available other than that to which the Regional Administrator objects. (See also paragraphs (b) (7) and (b) (8) of this section.)

(18) *Activities in Coastal Zones and Marine Sanctuaries.* (i) Applications for Department of the Army authorizations for activities in the coastal zones of those States having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued until the applicant has certified that his proposed activity complies with the coastal zone management program and the appropriate State agency has concurred with the certification or has waived its right to do so (see paragraph (i) (2) (ii) of this section); however, a permit may be issued if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is con-

sistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security.

(ii) Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972 will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972 and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary. Authorizations so issued will contain such special conditions as may be required by the Secretary of Commerce in connection with his certification.

(h) *Applications for Authorizations.*

(1) Any person proposing to undertake any activity requiring Department of the Army authorization as specified in paragraph (e) of this section, must apply for a permit to the District Engineer in charge of the District where the proposed activity is to be performed. Applications for permits must be prepared in accordance with instructions in the pamphlet entitled "Applications for Department of the Army Permits for Activities in Waterways" published by the Corps of Engineers, utilizing the prescribed application form (ENG Form 4345). The form and pamphlet may be obtained from the District Engineer having jurisdiction over the waterway in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with State and local agencies may be proposed by District or Division Engineers. These variations will be submitted for approval to DAEN-CWO-N and for clearance by the Office of Management and Budget.

(2) Generally, the application must include a complete description of the proposed activity, which includes necessary drawings, sketches or plans, the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners and the location and dimensions of adjacent structures; and the approvals required by other Federal, interstate, State or local agencies for the work, including all approvals or denials already made.

(i) If the activity involves dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(ii) If the activity includes the discharge of dredged or fill material in the navigable waters or the transportation of dredged material for the purpose of dumping it in the ocean waters, the ap-

plication must include the source of the material, a description of the type, composition and quantity of the material, the method of transportation and disposal of the material, and the location of the disposal site. Certification under section 401 of the Federal Water Pollution Control Act is required for such discharges into navigable waters. In addition, applicants for permits for these activities are required to pay a fee of \$100 per application if the quantity of the material to be discharged in navigable waters or to be dumped in ocean waters exceeds 2500 cubic yards; if the quantity of material is 2500 cubic yards or less, the fee is \$10 per application. Agencies or instrumentalities of Federal, State, or local governments will not be required to pay any fee in connection with applications for permits. This fee structure will be reviewed from time to time.

(iii) If the activity includes the construction of a fill or pile or float-supported platform, the project description must include specific structures to be erected on the fill or platform.

(iv) If the activity includes the construction of a structure the normal use of which may result in a discharge of pollutants, other than dredged or fill material, into navigable waters or ocean waters, the application must include either the identification of the application for the discharge permit assigned by the appropriate water pollution control agency or a copy of that application. Certification under Section 401 of the Federal Water Pollution Control Act is required for such discharges into navigable waters.

(v) If the activity will be located within a marine sanctuary established by the Secretary of Commerce, the application must include a copy of the certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972 and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(vi) If the activity requires the preparation of an environmental impact statement (see paragraphs (i) (1) (iv) and (1) of this section), which necessitates the development of data and information which will result in substantial expense to the United States, the District Engineer may, after obtaining written approval from the Division Engineer, charge the applicant for those extraordinary expenses incurred in the development of this information pursuant to 31 U.S.C. 483(a). All money so collected shall be paid into the Treasury of the United States as miscellaneous receipts. In lieu of this assessment, the District Engineer may require reports, data, and other information for the environmental impact statement (see paragraph (h) (3) of this section), to be compiled by an independent third party under contract with the applicant and furnished directly to the District Engineer; *Provided*, In such cases, the District En-

gineer shall specify the type of information to be developed; and *provided further*, That the information furnished by this third party contractor may not be used by the District Engineer to assist in his preparation of the environmental impact statement unless he has approved the selection of this third party contractor after consulting with interested Federal, State, and local agencies, public interest groups, and members of the general public, as he deems appropriate, to assure objectivity in this selection. In either case, the District Engineer should advise the applicant in writing that there is no assurance that favorable action will ultimately be taken on his application.

(3) In addition to that information indicated in paragraph (h) (2) of this section, the applicant will be required to furnish such additional information as the District Engineer may deem necessary to assist him in his evaluation of the application. Such additional information may include an environmental assessment, including information on alternate methods and sites, as may be necessary for the preparation of an environmental impact statement (see paragraph (l), below).

(4) The application must be signed by the person who desires to undertake the proposed activity; however, the application may be signed by a duly authorized agent if accompanied by a statement by that person designating the agent and agreeing to furnish, upon request, supplemental information in support of the application. In either case, the signature of the applicant will be understood to be an affirmation that he possesses the authority to undertake the activity proposed in his application, except where the lands are under the control of the Corps of Engineers, in which case the District Engineer will coordinate the transfer of the real estate and the permit action. When the application is submitted by an agent, the application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area.

(i) *Processing Applications for Permits—(1) Standard Procedures.* (i) When an application for a permit is received, the District Engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness and obtain from the applicant any additional information he deems necessary for further processing.

(ii) When all required information has been provided, the District Engineer will issue a public notice as described in paragraph (j) of this section unless specifically exempted by other provisions of this regulation. The notice will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate State agencies, to concerned Federal

agencies, to local, regional and national shipping and other concerned business and conservation organizations, and to any other interested parties. If in the judgment of the District Engineer the proposal may result in substantial public interest, the public notice (without drawings) may be published for five consecutive days in the local newspaper, and the applicant shall reimburse the District Engineer for the costs of publication. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the Field Representative of the Secretary of the Interior, the Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the State agency responsible for fish and wildlife resources, the District Commander, U.S. Coast Guard, and the Office of the Chief of Engineers, Attention: DAEN-CWO-N.

(iii) The District Engineer shall consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of the official file on the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another Federal agency, the District Engineer may seek the advice of that agency. The applicant must be given the opportunity to furnish the District Engineer his proposed resolution or rebuttal to all objections from Government agencies and other substantive adverse comments before final decision will be made on the application.

(iv) The District Engineer will consider whether or not an environmental impact statement is necessary (see paragraph (l) of this section) at the earliest time during the processing of an application involving an activity which is not already subject to an environmental impact statement. This will be done when he can make an assessment of the environmental impact of a proposed activity, which in some cases may be upon receipt of the application due to the magnitude of the proposed project or the nature of the area involved. This will be reconsidered as additional information is developed; however, at the earliest time that it appears an environmental impact statement may be required, the District Engineer will require the applicant to furnish additional information and an analysis of the environmental impacts of the proposed action. A preliminary determination as to whether an environmental impact statement will be prepared or a statement that an environmental impact statement has already been prepared on

the overall activity by the Corps of Engineers or another Federal agency, will be announced in the Public Notice (see paragraph (j) of this section). If the District Engineer determines that an environmental impact statement will not be prepared for the proposed activity, a finding to that effect will immediately be placed in the permit file and, if the public notice has indicated an intent to prepare a statement, will be announced to the public. This finding shall be dated and signed and shall include a brief statement of the facts and reasons for the decision. If the District Engineer believes that granting the permit may be warranted but that the proposed activity would significantly affect the quality of the human environment, he will prepare an environmental impact statement in accordance with § 209.410. In such cases and if a public hearing is to be held (see subparagraph (v), below), the proposed final environmental impact statement must be completed prior to the hearing. If a public meeting is held, however, the draft environmental impact statement will be filed with the Council on Environmental Quality (CEQ) at least 15 days prior to the meeting.

(v) If the proposed activity includes the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping it in ocean waters and a person or persons having an interest which may be affected by the issuance of a permit requests a hearing, or if a second State objects to issuance of a permit on the basis of water quality and requests a hearing, or if otherwise required by law or directed by the Chief of Engineers, the District Engineer will arrange a public hearing in accordance with applicable Corps of Engineers regulations (§ 209.133). If no public hearing is to be held and the District Engineer determines that public interest warrants and additional information necessary to the proper evaluation of the application would probably be obtained thereby, the District Engineer will hold a public meeting (see paragraph (k) of this section).

(vi) After all above actions have been completed, the District Engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. If a permit is warranted, he will determine the conditions and duration which should be incorporated into the permit (see paragraphs (m) and (n) of this section). In accordance with the authorities specified in paragraph (p) of this section the District Engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final environmental impact statement if prepared, and a statement of findings to support his recommendation, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed in paragraph (s) of this section. Notice that the application has been forwarded to higher headquarters will be furnished the applicant. When the final

decision is made, the statement of findings to support that decision will be placed in the permit file. If an environmental impact statement was filed with CEQ, a copy of the statement of findings will be submitted to DAEN-CWO-N for filing with CEQ. In those cases where an environmental impact statement has not been prepared but the application is forwarded for decision in the format prescribed in paragraph (s) of this section, the report will serve as the Statement of Findings.

(vii) If the final decision is to deny the permit, the applicant will be advised in writing of the reason for denial. If the final decision is to issue the permit, the issuing official will forward two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing officials who then signs and dates the permit. The permit is not valid until signed by the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of his application or signature of the issuing official on the authorizing document.

(viii) The District Engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. This list will be distributed to all persons who received any of the public notices listed.

(ix) If the applicant fails to respond within six months to any request or inquiry of the District Engineer, the District Engineer may advise the applicant by registered letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(2) *Procedures for Particular Types of Permit Situations.* (i) Activities requiring water quality certification:

(a) If water quality certification for the proposed activity is necessary under the provisions of the Federal Water Pollution Control Act, the District Engineer shall so notify the applicant and obtain from him either the appropriate certification or a copy of his application for such certification. The District Engineer shall forward one copy of the permit application to the appropriate certifying agency and two copies to the Regional Administrator of the Environmental Protection Agency (EPA). The District Engineer may issue the public notice of the application jointly with the certifying agency if arrangements for such joint notices have been approved by the Division Engineer. When the certification is received a copy of the certification will be forwarded to the Regional Administrator of EPA who shall determine if the proposed activity may affect the quality of the waters of any State or States other than the State in which the work is to be performed. If he needs supplemental information in order to make this determination, the Regional Ad-

ministrator may request it from the District Engineer who shall obtain it from the applicant and forward it to the Regional Administrator. The Regional Administrator shall, within thirty days of receipt of the application, certification and supplemental information, notify the affected State, the District Engineer, and the applicant in the event such a second State may be affected. The second State then has sixty days to advise the District Engineer that it objects to the issuance of the permit on the basis of the effect on the quality of its waters and to request a hearing.

(b) No authorization will be granted until required certification has been obtained or has been waived. Waiver is deemed to occur if the certifying agency fails or refuses to act on a request for certification within a reasonable period of time after receipt of such request. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced, the District Engineer will verify that the certifying agency has received a valid request for certification. Three months shall generally be considered to be a reasonable period of time. If, however, special circumstances identified by the District Engineer require that action on an application be taken within a more limited period of time, the District Engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly if it appears that circumstances may reasonably require a period of time longer than three months, the District Engineer may afford the certifying agency up to one year to provide the required certification before determining that a waiver has occurred. District Engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(ii) If the proposed activity will be located in the coastal zone of a State, the District Engineer shall obtain from the applicant a certification that the activity conforms to the coastal zone management program of the State. Upon receipt of the certification, the District Engineer will forward a copy of the permit application and certification to the State agency responsible for implementing the coastal zone management program and request its concurrence or objection. The District Engineer can issue the public notice of the application jointly with the State agency if arrangements for such joint notices have been approved by the Division Engineer. A copy of the certification will also be sent, along with the public notice of the application to the Director, Office of Coastal Zone Management, NOAA, Department of Commerce, Rockville, Maryland 20852. If the State agency fails to concur or object to the certification within six months of receipt of the request, it will be presumed to waive its

right to so act and the certification will be presumed to be valid. Before determining that a waiver has occurred, the District Engineer will check with the State agency to verify that it has failed to act. If the State agency objects to the proposed activity, the District Engineer will so advise the Director, Office of Coastal Zone Management, NOAA, and request advice within thirty days whether or not the Secretary of Commerce will review the objection. If the objection will not be reviewed, the permit will be denied. If, however, the Secretary of Commerce indicates he will review the objection, further action on the application will be held in abeyance pending notification of the results of the review. If the objection is sustained, the permit will be denied. If the objection is overruled by the Secretary's finding, however, the processing will be continued.

(iii) If the proposed activity involves any property listed in the National Register of Historic Places (which is published in its entirety in the Federal Register annually in February with addenda published each month), the District Engineer will determine if any aspect of the activity causes or may cause any change in the quality of the historical, architectural, archeological, or cultural character that qualified the property for listing in the National Register. Generally adverse effects occur under conditions which include but are not limited to destruction or alteration of all or part of the property; isolation from or alteration of its surrounding environment; and introduction of visual, audible, or atmospheric elements that are out of character with the property and its setting. If the District Engineer determines that the activity will have no effect on the property, he will proceed with the standard procedures for processing the application. If, however, the District Engineer determines that the activity will have an effect on the property, he will proceed in accordance with the procedures specified in the FEDERAL REGISTER, Volume 37, Number 220, November 14, 1972, pages 24146 to 24148.

(iv) If the proposed activity consists of the dredging of an access channel and/or berthing facility associated with an authorized Federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the Federal project to the maximum extent feasible. Separate notice, meeting or hearing, and environmental impact statement will not be required for activities so included and coordinated; and the public notice issued by the District Engineer for these Federal and associated non-Federal activities will be the notice of intent to issue permits for those included non-Federal dredging activities required by paragraph (g) (17) (iv) of this section. The decision whether to issue or deny such a permit will be consistent with the decision on the Federal project unless special considerations applicable to the proposed activity are identified.

(v) In addition to the general distribution of public notices cited in paragraph (i) (1) (iv) of this section, notices will be sent to other addressees in appropriate cases as follows:

(a) If the activity involves structures or dredging along the shores of the sea or Great Lakes, to the Coastal Engineering Research Center, Washington, D.C. 20016.

(b) If the activity involves construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Deputy Assistant Secretary of Defense (Installations and Housing) Washington, D.C. 20310, the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390, Attention, Code N512, and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(c) If the activity involves the construction of structures to enhance fish propagation along the Atlantic and Gulf coasts, to the Atlantic Estuarine Fisheries Center, National Marine Fisheries Service, NOAA, Department of Commerce, Beaufort, North Carolina 28516.

(d) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(e) If the activity is in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230, and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(vi) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(a) If the activity involves the construction of structures or artificial islands on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390, Attention, Code N512 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(b) If the activity involves the construction of structures to enhance fish propagation (fish havens) along the coasts of the United States, to Defense Mapping Agency, Hydrographic Center and National Ocean Survey as in paragraph (i) (2) (vi) (a) of this section and to the Atlantic Estuarine Fisheries Center, National Marine Fisheries Service, NOAA, Department of Commerce, Beaufort, North Carolina 28516.

(c) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(d) If the activity is listed in paragraph (i) (2) (vi) (a), (b), or (c) of this section or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the ap-

propriate District Commander, U.S. Coast Guard.

(vii) If the District Engineer determines that a letter or permission (see paragraph (m) of this section) is the appropriate form of authorization to be issued, he may omit the publishing of a public notice; however, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and State, as required by the Fish and Wildlife Coordination Act. A copy of the letter of permission will be sent to the Regional Director, Bureau of Sport Fisheries and Wildlife.

(viii) If the circumstances surrounding a permit application require emergency action and the District Engineer considers that the public interest requires that the standard procedures must be abbreviated in the particular case, he will explain the circumstances and recommend special procedures to the Chief of Engineers, ATTN: DAEN-CWO-N by teletype. The Chief of Engineers, upon consultation with the Secretary of the Army or his authorized representative and other affected agencies, will instruct the District Engineer as to further processing of the application.

(3) *Timing of Processing of Applications.* In view of the extensive coordination with other agencies and the public and the study of all aspects of proposed activities required by the above procedures, applicants must allow adequate time for the processing of their applications. The District Engineer will be guided by the following time limits for the indicated steps in processing permit applications:

(i) Public notice should be issued within fifteen days of receipt of all required information from the applicant, unless joint notice with State agencies is to be used.

(ii) The receipt of comments as a result of the public notice should not extend beyond seventy-five days from the date of the notice.

(iii) The record of a public meeting should be closed not later than fifteen days after the meeting.

(iv) The District Engineer should either send notice of denial to the applicant, or issue the draft permit to the applicant for acceptance and signature, or forward the application to higher headquarters within thirty days of one of the following whichever is latest: receipt of notice of withdrawal of objections; completion of coordination following receipt of applicant's rebuttal of objections; receipt of the record of a public hearing; closing of the record of a public meeting; or expiration of the waiting period following the filing of the final environmental impact statement with CEQ.

(j) *Public Notice and Coordination with Interested Parties.* (1) The Public Notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice

must, therefore, include sufficient information to give a clear understanding of the nature of the activity to generate meaningful comments. The notice should include the following items of information:

(i) The name and address of the applicant;

(ii) The location of the proposed activity;

(iii) A brief description of the proposed activity, its purpose and intended use, including a description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms, and a description of the type, composition and quantity of materials to be discharged or dumped and means of conveyance;

(iv) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(v) A list of other government authorizations obtained or requested, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(vi) A statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement;

(vii) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest, including environmental values;

(viii) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application; and

(ix) A paragraph describing the various factors on which decisions are based during evaluation of a permit application.

(a) Except as provided in paragraph (j) (1) (ix) (b) of this section the following will be included:

The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered; among those are conservation, economics, aesthetic, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use classification, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(1) If a Federal agency other than the Corps of Engineers has primary responsibility for licensing an activity and for environmental review as contemplated by the provisions of the National Environmental Policy Act, (see paragraph

(e) (3) of this section), the public notice shall, in lieu of the general paragraph above, describe the actions and reviews pending before those agencies, recite the fact that District Engineers will consult with, and give due consideration to the findings of, those agencies, and provide the following paragraph: "The decision whether to issue a permit will be based on a consideration of the effect which the proposed activity will have on the navigable capacity of the waterway." (See particularly paragraphs (g) (13), (g) (15), and (g) (16) of this section.)

(2) If the activity involves the discharge of dredged or fill material into the navigable waters or the transportation of dredged material for the purpose of dumping it in ocean waters, the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, under authority of section 404(b) of the Federal Water Pollution Control Act or of the criteria established under authority of section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972 as appropriate.

(b) In cases involving construction of fixed structures or artificial islands on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(x) If the activity includes the discharge of dredged or fill material in the navigable waters or the transportation of dredged material for the purpose of dumping it in ocean waters, the following statement will also be included in the public notice:

Any person who has an interest which may be adversely affected by the issuance of a permit may request a public hearing. The request must be submitted in writing to the District Engineer within thirty days of the date of this notice and must clearly set forth the interest which may be adversely affected and the manner in which the interest may be adversely affected by the activity.

(2) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the application. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the District Engineer may request their comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent or himself, the District Engineer will inform the member of Congress of the final decision.

(3) Notices sent to several agencies within the same State may result in con-

flicting comments from those agencies. While many States have designated a single State agency or individual to provide a single and coordinated State position regarding pending permit applications, where a State has not so designated a single source, District Engineers will elicit from the Governor an expression of his views and desires concerning the application. Where coordination is required by the Fish and Wildlife Coordination Act (see paragraph (c) (5) of this section), District Engineers will address a letter to the designated single State agency or Governor, as appropriate, inviting attention to the coordination requirements of the Fish and Wildlife Coordination Act and requesting that a report from the head of the State agency responsible for fish and wildlife resources be appended to the coordinated State report.

(k) *Public Meetings.* (1) It is the policy of the Corps of Engineers to conduct the civil works program in an atmosphere of public understanding, trust, mutual cooperation, and in a manner responsive to the public interest. The views of all concerned persons are initially sought by means of public notices in connection with applications for permits. Where response to a notice indicates further opportunity for public expressions of interest may be warranted, and a public hearing is not required by law or directed by the Chief of Engineers, the District Engineer may hold a public meeting.

(2) A public meeting is a forum at which all concerned persons are given an opportunity to present additional information relevant to a proper evaluation of an application for a permit for an activity. If a public meeting is held, notice announcing the meeting will be published at least thirty days in advance of the meeting. A summary of environmental considerations will be included in the notice. The applicant will be given an opportunity to present his proposal and explain why he thinks it is in the public interest. Officials of other Federal agencies or of State and local governments will be given opportunity to express their views, as well as other persons. The conduct of the meeting will be in accordance with § 209.405 and a transcript of the meeting will be part of the record.

(1) *Environmental Impact Statement.* (1) Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) requires all Federal agencies, with respect to major Federal actions significantly affecting the quality of the human environment, to submit to CEQ a detailed statement on:

- (i) The environmental impact of the proposed action;
- (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) Alternatives to the proposed action;
- (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(2) As indicated in paragraph (i) (1) (iv) of this section the District Engineer must determine whether an environmental impact statement is required in connection with a permit application. If the District Engineer believes that granting the permit may be warranted but that the proposed activity would have a significant environmental impact, an environmental impact statement will be prepared, coordinated and filed in accordance with provisions of § 209.410 prior to final action on the application. If another agency is the lead agency as defined by section 5b of the CEQ guidelines contained in § 209.410, the District Engineer will coordinate with that agency to insure that the resulting environmental impact statement adequately describes the impact of the activity which is subject to Corps permit authority.

(3) The scope of the considerations to be discussed in an environmental impact statement depends heavily on continuing court interpretation of NEPA and on the nature of the activity for which authorization is requested.

(i) All the direct effects of the activity must be evaluated, as must any indirect effects which have a clear or proximate relationship to the activity. Other effects, however, may be too speculative or remote to merit detailed consideration. Thus an environmental impact statement which examines the probable environmental impact of an activity should evaluate all known effects which have a direct or proximate but indirect relationship to the proposal and should cite other remote or speculative effects.

(ii) The scope of the environmental impact statement is often somewhat different from that of the laws under which the activity may be authorized. Thus, an authorization may be only for a part of a much larger and more complex operation or development over which few regulatory controls exist. In such cases, the range of factors to be discussed in the environmental impact statement may of necessity be expanded to include factors which are beyond the normal scope of the law on which the authorization depends.

(m) *Forms of Authorization.* (1) The basic form for authorizing activities in navigable waters or ocean waters is ENG Form 1721, Department of the Army Permit (Appendix C). This form will be used to authorize activities under provisions of:

(i) Section 10 of the River and Harbor Act of March 3, 1899, in all cases where a letter of permission is not appropriate (see paragraph m(3) of this section.)

(ii) Section 404 of the Federal Water Pollution Control Act.

(iii) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1973.

(2) While the general conditions included in ENG Form 1721 are normally applicable to all permits, some may not

apply to certain authorizations (e.g. after-the-fact situations where work is completed, or situations in which the permittee is a Federal agency) and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in the navigable waters or ocean waters.

(3) In those cases subject to section 10 of the River and Harbor Act of March 3, 1899, in which, in the opinion of the District Engineer, the proposed work is minor, will not have significant impact on environmental values, and should encounter no opposition, the District Engineer may use the abbreviated processing procedures of paragraph (1) (2) (vii) of this section and authorize the work by a letter of permission. The letter of permission will not be used to authorize the discharge of dredged or fill material into navigable waters or the transportation of dredged material for purpose of dumping it in ocean waters. The letter of permission will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority (i.e., 33 U.S.C. 403), any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions from ENG form 1721 will be attached and will be incorporated by reference into the letter of permission.

(4) Permits for structures under section 9 of the Act of March 3, 1899, will be drafted during review procedures at Department of the Army level.

(n) *Duration of Authorizations.* (1) Authorizations for activities in or affecting navigable waters or ocean waters may authorize both the work and the resulting structure. Authorizations continue in effect until they automatically expire, or are modified, suspended, or revoked.

(2) Authorization for the existence of a structure or other form of alteration of the waterway is usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the authorization will be of limited duration with a definite expiration date. Except as provided in paragraph (r) (5) of this section permits for the discharge of dredged material in the navigable waters or for the transportation of dredged material for the purpose of dumping it in ocean waters will be of limited duration with a definite expiration date.

(3) Authorizations for construction work or other activity will specify time limits for accomplishing the work or activity. The time limits will specify a date by which the work must be started, normally one year from the date of issuance, and a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. An authorization for work or other activity will automatically expire if the permittee fails to request an extension or revalidation.

(4) Extensions of time may be granted by the District Engineer for authorizations of limited duration, or for the time limitations imposed for starting or completing the work or activity. The permittee must request the extension and explain the basis of the request, which will be granted only if the District Engineer determines that an extension is in the general public interest. Requests for extensions will be processed in accordance with the regular procedures of paragraph (1) of this section including issuance of a public notice, except that such processing is not required where the District Engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(5) If the authorized work includes periodic maintenance dredging (see paragraph (g) (2) of this section), an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after his evaluation of the proposed method of dredging and disposal of the dredged material. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a revalidation of that portion of his permit which authorized the maintenance dredging. The request must be made to the District Engineer six months prior to the expiration date, and include full description of the proposed methods of dredging and disposal of dredged materials. The District Engineer will process the request for revalidation in accordance with the standard procedures in paragraph (h) of this section including the issuance of a public notice describing the authorized work to be maintained and the proposed methods of maintenance.

(o) *Modification, Suspension or Revocation of Authorizations.* (1) The District Engineer may evaluate the circumstance and conditions of a permit either on his own motion or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the general public interest. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the activity authorized have changed since the permit was issued, extended or revalidated, and the continuing adequacy of the permit conditions; any significant objections to the activity authorized by the permit which were not earlier considered; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with paragraph

(4) of this section, and not as modifications under this paragraph.

(2) The District Engineer, as a result of reevaluation of the circumstances and conditions of a permit, may determine that protection of the general public interest requires a modification of the terms or conditions of the permit. In such cases, the District Engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the District Engineer will give the permittee written notice of the modification, which will then become effective on such date as the District Engineer may establish, which in no event shall be less than ten days from its date of issuance. In the event a mutual agreement cannot be reached by the District Engineer and the permittee, the District Engineer will proceed in accordance with paragraph (c) (3) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the District Engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a hearing. The modification will become effective on the date set by the District Engineer which shall be at least ten days after receipt of the notice unless a hearing is requested within that period in accordance with § 209.133. If the permittee fails or refuses to comply with the modification the District Engineer will immediately refer the case for enforcement to DAEN-GCK.

(3) The District Engineer may, after telephonic consultation with the Division Engineer, suspend a permit after preparing a written determination and finding that immediate suspension would be in the general public interest. The District Engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop all previously authorized activities. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may request a hearing within 10 days of receipt of notice of the suspension to present information in this matter. If a hearing is requested the procedures prescribed in § 209.133 will be followed. After the completion of the hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing is requested) the District Engineer will take action to reinstate the permit, modify the permit, or recommend revocation of the permit in accordance with paragraph (c) (4) of this section.

(4) Following completion of the suspension procedures in paragraph (c) (3) of this section, if revocation of the permit is recommended, the District Engineer will prepare a report of the circumstances and forward it together with the

record of the suspension proceedings to DAEN-CWO-N. The Chief of Engineers may, prior to deciding whether or not to revoke the permit, afford the permittee the opportunity to present any additional information not made available to the District Engineer at the time he made the recommendation to revoke the permit including, where appropriate, the means by which he intends to comply with the terms and conditions of the permit. The permittee will be advised in writing of the final decision.

(p) *Authority to Issue or Deny Authorizations.* Except as otherwise provided in this regulation, the Secretary of the Army subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for construction or other work in or affecting navigable waters of the United States pursuant to sections 10 and 14 of the Act of March 3, 1899, and section 1 of the Act of June 13, 1902. He also has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for the discharge of dredged or fill material in the navigable waters pursuant to section 404 of the Federal Water Pollution Control Act or for the transportation of dredged material for the purpose of dumping it into ocean waters pursuant to section 103 of Marine Protection, Research and Sanctuaries Act of 1972. The authority to issue or deny permits pursuant to section 9 of the River and Harbor Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(1) District Engineers are authorized to issue in accordance with this regulation permits and letters of permission which are subject to such special conditions as are necessary to protect the public interest in the navigable waters or ocean waters pursuant to sections 10 and 14 of the River and Harbor Act of March 3, 1899, section 1 of the River and Harbor Act of June 13, 1902, section 404 of the Federal Water Pollution Control Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, in all cases in which there are no known substantive objections to the proposed work or activity or in which objections have been resolved to the satisfaction of the District Engineer. It is essential to the legality of a permit that it contain the name of the District Engineer as the issuing officer. However, the permit need not be signed by the District Engineer, in person; but may be signed for and in behalf of him by whomever he designates. District Engineers are authorized to deny permits when required State or local authorization and/or certification has been denied (see paragraph (f) (3) (i) of this section), when a State has objected to a required certification of compliance with its coastal zone management program and the Secretary of Commerce has not reviewed the action and reached a contrary finding (see paragraph (g) (18) and (i) (2) (ii) of this section) or when the proposed work will unduly interfere with naviga-

tion. All other permit applications including those cases in paragraph (p) (2) (i) through (vii) of this section will be referred to Division Engineers. District Engineers are also authorized to add, modify, or delete special conditions in permits, except for those conditions which have been imposed by higher authority, and to suspend permits according to the procedures of paragraph (o) (3) of this section.

(2) Division Engineers will review, attempt to resolve outstanding matters, and evaluate all permit applications referred by District Engineers. Division Engineers may authorize the issuance or denial of permits pursuant to sections 10 and 14 of the River and Harbor Act of March 3, 1899, section 1 of the River and Harbor Act of June 13, 1902, section 404 of the Federal Water Pollution Control Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 and the inclusion of conditions to those permits as may be necessary to protect the public interest in the navigable waters or ocean waters in accordance with the policies cited in this regulation.

(i) Except as provided in paragraph (p) (2) (ii) of this section if the Division Engineer determines that issuance of a permit with or without conditions is in the public interest, but there is continuing objection to the issuance of the permit by another Federal agency, he shall advise the regional representative of that Federal agency of his intent to issue the permit. The Division Engineer shall not proceed with the issuance of a permit if, within 15 days after the date of this notice of intent to issue a permit, an authorized representative of that Federal Agency indicates to the Division Engineer in writing that he wishes to bring his concerns to Departmental level. In such cases, the proposed permit may be issued at the expiration of 30 days from the date of receipt of the letter from such representative unless, prior to that time, as a result of consultations at Departmental level, it is directed that the matter be forwarded to higher authority for resolution. Thereafter, a permit will be issued only pursuant to and in accordance with instructions from such higher authority. Every effort should be made to resolve differences at the Division Engineer level before referring the matter to higher authority.

(ii) Division Engineers will refer to the Chief of Engineers the following cases:

(a) When it is proposed to issue a permit and there are unresolved objections from another Federal agency which must be handled under special procedures specified in statutes or Memoranda of Understanding which thereby preclude final resolution by the Division Engineer (see paragraphs (g) (4), (5) and (17) of this section);

(b) When the recommended decision is contrary to the stated position of the Governor of the affected State or of a member of Congress;

(c) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(d) When higher authority requests the case be forwarded for decision;

(e) Where the case is recognized to be highly controversial, or litigation is anticipated;

(f) When the proposed activity would affect the baseline used for determination of the limits of the territorial sea.

Division Engineers may also authorize the modification or suspension of permits in accordance with the procedures of this regulation, and may recommend revocation of permits to the Chief of Engineers.

(q) *Supervision and Enforcement.* (1) District Engineers will supervise all authorized activities and will require that the activity be conducted and executed in conformance with the approved plans and other conditions of the permit. Inspections must be made on timely occasions during performance of the activity and appropriate notices and instructions will be given permittees to insure that they do not depart from the approved plans. Reevaluation of permits to assure compliance with its purposes and conditions will be carried out as provided in paragraph (o) of this section. If there are approved material departures from the authorized plans, the District Engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(2) Where the District Engineer determines that there has been noncompliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the District Engineer will issue an immediately effective notice of suspension in accordance with paragraph (o) (3) of this section above, and consider initiation of appropriate legal action.

(3) For purposes of supervision of permitted activities and for surveillance of the navigable waters for enforcement of the permit authorities cited in paragraph (b) of this section, the District Engineer will use all means at his disposal. One method of surveillance for unauthorized activities which should be used where appropriate is aerial photographic reconnaissance. In addition, all Corps of Engineers employees will be instructed to observe and report all activities in navigable waters which would require permits. The assistance of members of the public and personnel of other interested Federal, State and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the District Engineer will require a copy of ENG Form 4336 to be posted conspicuously at the site of all authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorizations. Furthermore, significant actions taken under paragraph (o), above, will be brought to the attention of those Federal, State and local agencies and

other persons who express particular interest in the affected activity. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1973. Enforcement actions relative to the permit authorities cited in paragraph (b) of this section, including enforcement actions resulting from non-compliance with permit conditions, will be in accordance with regulations published at § 209.170 (ER 1145-2-301).

(4) The expenses incurred in connection with the inspection of permitted activity in navigable waters normally will be paid by the Federal Government in accordance with the provisions of Section 6 of the River and Harbor Act of 3 March 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, and after approval by the Division Engineer, the permittee will be required to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States inspector either directly or through the District Engineer. The inspector will be paid on regular payrolls or service vouchers. The District Engineer will collect the cost from the permittee in accordance with the following:

(i) At the end of each month the amount chargeable for the cost of inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(ii) If the District Engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accordance with paragraph (q) (4) (i) of this section, he may require the permittee to keep on deposit with the District Engineer at all times an amount equal to the estimated cost of inspection and supervision for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified checks so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(iii) On completion of work under a permit, and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permittee, it will be referred to the Division Engineer for approval before it is closed and before any deposits are returned to the permittee.

(5) If the permitted activity includes restoration of the waterway to its orig-

inal condition, or if the issuing official has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest in the waterway, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

(r) *Publicity.* District Engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in navigable waters or ocean waters. Whenever the District Engineer becomes aware of plans being developed by either private or public entities who might require permits in order to implement the plans, he will advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Similarly when the District Engineer is aware of changes in Corps of Engineers regulatory jurisdiction he will issue appropriate public notices.

(s) *Reports.* The report of a District Engineer on an application for a permit requiring action by the Division Engineer or by the Chief of Engineers will be in a letter form with the application and all pertinent comments, records and studies including the final environmental impact statement if prepared, as inclosures. The following items will be included or discussed in the report:

- (1) Name of applicant.
- (2) Location, Character and purpose of proposed activity.
- (3) Applicable statutory authorities and administrative determinations conferring Corps of Engineers regulatory jurisdiction.
- (4) Other Federal, State, and local authorizations obtained or required and pending.
- (5) Date of public notice and public meeting or public hearings, if held, and summary of objections offered with comments of the District Engineer thereon. The comments should explain the objections and not merely refer to inclosed letters.
- (6) Views of State and local authorities.
- (7) Views of District Engineer concerning probable effect of the proposed work on:
 - (i) Navigation, present and prospective.
 - (ii) Harbor lines, if established.
 - (iii) Flood heights, drift and flood damage protection.
 - (iv) Beach erosion or accretion.
 - (v) Conservation.
 - (vi) Fish and Wildlife.
 - (vii) Water Quality.
 - (viii) Aesthetics.
 - (ix) Ecology (General Environmental Concerns).
 - (x) Historic values.
 - (xi) Recreation.
 - (xii) Economy.
 - (xiii) Water supply.
 - (xiv) Land use classification and coastal zone management plans.

(xv) Public Interest (Needs and Welfare of the People).

(8) Other pertinent remarks, including:

- (i) Extent of public and private need;
- (ii) Desirability of using appropriate alternatives;
- (iii) Extent and permanence of beneficial and/or detrimental effects; and
- (iv) Probable impact in relation to cumulative effects created by other activities.

(9) A copy of the environmental assessment and summary of the environmental impact statement if prepared.

(10) A Statement of Findings as an inclosure.

(11) Conclusions.

(12) Recommendations including any proposed special conditions.

APPENDIX A—U.S. COAST GUARD/CHIEF OF ENGINEERS MEMORANDUM OF AGREEMENT

1. *Purpose and Authority:* A. The Department of Transportation Act, the Act of October 15, 1966, P.L. 89-670, transferred to and vested in the Secretary of Transportation certain functions, powers and duties previously vested in the Secretary of the Army and the Chief of Engineers. By delegation of authority from the Secretary of Transportation (49 CFR 1.46(c)) the Commandant, U.S. Coast Guard, has been authorized to exercise certain of these functions, powers and duties relating to bridges and causeways conferred by:

(1) the following provision of law relating generally to drawbridge operating regulations: Section 5 of the Act of August 18, 1894, as amended (28 Stat. 362; 33 U.S.C. 499);

(2) the following law relating generally to obstructive bridges: The Act of June 21, 1940, as amended (The Truman-Hobbs Act) (54 Stat. 497; 33 U.S.C. 511 et seq.);

(3) the following laws and provisions of law to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States:

(a) Section 9 of the Act of March 3, 1899, as amended (30 Stat. 1151; 33 U.S.C. 401);

(b) The Act of March 23, 1906, as amended (34 Stat. 84; 33 U.S.C. 491 et seq.); and

(c) The General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 525 et seq.) except Sections 502(c) and 503.

B. The Secretary of the Army and The Chief of Engineers continue to be vested with broad and important authorities and responsibilities with respect to navigable waters of the United States, including, but not limited to, jurisdiction over excavation and filling, design flood flows and construction of certain structures in such waters, and the prosecution of waterway improvement projects.

C. The purposes of this agreement are: (1) To recognize the common and mutual interest of the Chief of Engineers and the Commandant, U.S. Coast Guard, in the orderly and efficient administration of their respective responsibilities under certain Federal statutes to regulate certain activities in navigable waters of the United States;

(2) To clarify the areas of jurisdiction and the responsibilities of the Corps of Engineers and the Coast Guard with respect to:

- (a) the alteration of bridges
 - (1) in connection with Corps of Engineers waterway improvement projects, and
 - (2) under the Truman-Hobbs Act;
- (b) the construction, operation and maintenance of bridges and causeways as distinguished from other types of structures over or in navigable waters of the United States;

(c) the closure of waterways and the reconstruction of passage through or under bridges in connection with their construction, operation, maintenance and removal; and

(d) the selection of an appropriate design flood flow for flood hazard analysis of any proposed water opening.

(3) To provide for coordination and consultation on projects and activities in or affecting the navigable waters of the United States.

In furtherance of the above purposes the undersigned do agree upon the definitions, policies and procedures set forth below.

2. *Alteration of Bridges in or Across Navigable Waters Within Corps of Engineers Projects:* A. The Chief of Engineers agrees to advise and consult with the Commandant on navigation projects contemplated by the Corps of Engineers which require the alteration of bridges across the waterways involved in such projects. The Chief of Engineers also agrees to include in such project proposals the costs of alterations, exclusive of betterments, of all bridges within the limits of the designated project which after consultation with the Commandant he determines to require alteration to meet the needs of existing and prospective navigation. Under this concept the federal costs would be furnished under the project.

B. The Commandant of the Coast Guard agrees to undertake all actions and assumes all responsibilities essential to the determination of navigational requirements for horizontal and vertical clearances of bridges across navigable waters necessary in connection with any navigation project by the Chief of Engineers. Further, the Commandant agrees to conduct all public proceedings necessary thereto and establish guide clearance criteria where needed for the project objectives.

3. *Alteration of Bridges Under the Truman-Hobbs Act:* The Commandant of the Coast Guard acknowledges and affirms the responsibility of the Coast Guard, under the Truman-Hobbs Act, to program and fund for the alteration of bridges which, as distinct from project related alterations described in paragraph 2 herein, become unreasonable obstructions to navigation as a result of factors or changes in the character of navigation and this agreement shall in no way affect, impair or modify the powers or duties conferred by that Act.

4. *Approval, Alteration and Removal of Other Bridges and Causeways:* A. *General Definitions.* For purposes of this Agreement and the administration of the statutes cited in 1.A.(3) above, a "bridge" is any structure over, on or in the navigable waters of the United States which (1) is used for the passage or conveyance of persons, vehicles, commodities and other physical matter and (2) is constructed in such a manner that either the horizontal or vertical clearance, or both, may affect the passage of vessels or boats through or under the structure. This definition includes, but is not limited to, highway bridges, railroad bridges, foot bridges, aqueducts, aerial tramways and conveyors, overhead pipelines and similar structures of like function together with their approaches, fenders, pier protection systems, appurtenances and foundations. This definition does not include aerial power transmission lines, tunnels, submerged pipelines and cables, dams, dikes, dredging and filling in, wharves, piers, breakwaters, bulkheads, jetties and similar structures and works (except as they may be integral features of a bridge and used in its construction, maintenance, operation or removal; or except when they are affixed to the bridge and will have an effect on the clearances provided by the bridge) over which jurisdiction remains with the Department of the Army and the Corps of Engineers

under Sections 9 and 10 of the Act of March 3, 1899, as amended (33 U.S.C. 401 and 403). A "causeway" is a raised road across water or marshy land, with the water or marshy land on both sides of the road, and which is constructed in or affects navigation, navigable waters and design flood flows.

B. *Combined Structures and Appurtenances.* For purposes of the Act cited in 1.A.(3) above, a structure serving more than one purpose and having characteristics of either a bridge or causeway, as defined in 4.A., and some other structure, shall be considered as a bridge or causeway when the structure in its entirety, including its appurtenances and incidental features, has or retains the predominant characteristics and purpose of a bridge or causeway. A structure shall not be considered a bridge or causeway when its primary and predominant characteristics and purpose are other than those set forth above and it meets the general definitions above only in a narrow technical sense as a result of incidental features. This interpretation is intended to minimize the number of instances which will require an applicant for a single project to secure a permit or series of permits from both the Department of Transportation and the Department of the Army for each separate feature or detail of the project when it serves, incidentally to its primary purpose, more than one purpose and has features of either a bridge or causeway and features of some other structure. However, if parts of the project are separable and can be fairly and reasonably characterized or classified in an engineering sense as separate structures, each such structure will be so treated and considered for approval by the agency having jurisdiction thereover.

C. *Alteration of the Character of Bridges and Causeways.* The jurisdiction of the Secretary of Transportation and the Coast Guard over bridges and causeways includes authority to approve the removal of such structures when the owners thereof desire to discontinue their use. If the owner of a bridge or causeway discontinues its use and wishes to remove or alter any part thereof in such a manner that it will lose its character as a bridge or causeway, the Coast Guard will normally require removal of the structure from the waterway in its entirety. However, if the owner of a bridge or a causeway wishes to retain it in whole or in part for use other than for operation and maintenance as a bridge or causeway, the proposed structure will be considered as coming within the jurisdiction of the Corps of Engineers. The Coast Guard will refer requests for such uses to the Corps of Engineers for consideration. The Corps of Engineers agrees to advise the Commandant of the receipt of an application for approval of the conversion of a bridge or causeway to another structure and to provide opportunity for comment thereon. If the Corps of Engineers approves the conversion of a bridge or causeway to another structure, no residual jurisdiction over the structure will remain with the Coast Guard. However, if the Corps of Engineers does not approve the proposed conversion, then the structure remains a bridge subject to the jurisdiction of the Coast Guard.

5. *Closure of Waterways and Restriction of Passage through or under Bridges:* Under the statutes cited in Section 1 of this Memorandum of Agreement, the Commandant must approve the clearances to be made available for navigation through or under bridges. It is understood that this duty and authority extends to and may be exercised in connection with the construction, alteration, operation, maintenance and removal of bridges, and includes the power to authorize the temporary restriction of passage through or under a bridge by use of falsework, piling, floating equipment, closure of

draws, or any works or activities which temporarily reduce the navigation clearances and design flood flows, including closure of any or all spans of the bridge. Moreover, under the Ports and Waterways Safety Act of 1972, Public Law 92-340, 86 Stat. 424, the Commandant exercises broad powers in waterways to control vessel traffic in areas he determines to be especially hazardous and to establish safety zones or other measures for limited controls or conditional access and activity when necessary to prevent damage to or the destruction or loss of, any vessel, bridge, or other structure on or in the navigable waters of the United States. Accordingly, in the event that work in connection with the construction, alteration or repair of a bridge or causeway is of such a nature that for the protection of life and property navigation through or in the vicinity of the bridge or causeway must be temporarily prohibited, the Coast Guard may close that part of the affected waterway while such work is being performed. However, it is also clear that the Secretary of the Army and the Chief of Engineers have the authority, under Section 4 of the Act of August 18, 1894, as amended, (33 U.S.C. 1) to prescribe rules for the use, administration and navigation of the navigable waters of the United States. In recognition of that authority, and pursuant to Section 102 (c) of the Ports and Waterways Safety Act, the Coast Guard will consult with the Corps of Engineers when any significant restriction of passage through or under a bridge is contemplated to be authorized or a waterway is to be temporarily closed.

6. *Coordination and Cooperation Procedures.* A. District Commanders, Coast Guard Districts, shall send notices of applications for permits for bridge or causeway construction, modification, or removal to the Corps of Engineers Divisions and Districts in which the bridge or causeway is located.

B. District Engineers, Corps of Engineers, shall send notices of applications for permits for other structures or dredge and fill work to local Coast Guard District Commanders.

C. In cases where proposed structures or modifications of structures do not clearly fall within one of the classifications set forth in paragraph 4.A. above, the application will be forwarded with recommendations of the reviewing officers through channels to the Chief of Engineers and the Commandant of the Coast Guard who shall, after mutual consultation, attempt to resolve the question.

D. If the above procedures fail to produce agreement, the application will be forwarded to the Secretary of the Army and Secretary of Transportation for their determination.

E. The Chief of Engineers and the Commandant, Coast Guard, pledge themselves to mutual cooperation and consultation in making available timely information and data, seeking uniformity and consistency among field offices, and providing timely and adequate review of all matters arising in connection with the administration of their responsibilities governed by the Acts cited herein.

Dated: March 21, 1973.

C. R. BENDER.

Dated: April 18, 1973.

F. J. CLARKE.

APPENDIX B—MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

In recognition of the responsibilities of the Secretary of the Army under sections 10 and 13 of the Act of March 3, 1899 (33 U.S.C. 403 and 407), relating to the control of dredging, filling, and excavation in the navigable waters

of the United States, and the control of refuse in such waters, and the interrelationship of those responsibilities with the responsibilities of the Secretary of the Interior under the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661-666c), and the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a et seq.), relating to the control and prevention of water pollution in such waters and the conservation of the Nation's natural resources and related environment, including fish and wildlife and recreational values therein; in recognition of our joint responsibilities under Executive Order No. 11288 to improve water quality through the prevention, control, and abatement of water pollution from Federal and federally licensed activities; and in recognition of other provisions of law and policy, we, the two Secretaries, adopt the following policies and procedures:

POLICIES

1. It is the policy of the two Secretaries that there shall be full coordination and co-operation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States, and they shall avail themselves of the technical advice and assistance which such Directors may provide.

2. The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.

PROCEDURES FOR CARRYING OUT THESE POLICIES

1. Upon receipt of an application for a permit for dredging, filling, excavation, or other related work in navigable waters of the United States, the District Engineers shall send notices to all interested parties, including the appropriate Regional Directors of the Federal Water Pollution Control Administration, the United States Fish and Wildlife Service, and the National Park Service of the Department of the Interior, and the appropriate State conservation, resources, and water pollution agencies.

2. Such Regional Directors of the Secretary of the Interior shall immediately make such studies and investigations as they deem necessary or desirable, consult with the appropriate State agencies, and advise the District Engineers whether the work proposed by the permit applicant, including the deposit of any material in or near the navigable waters of

the United States, will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment.

3. The District Engineer will hold public hearings on permit applications whenever response to a public notice indicates that hearings are desirable to afford all interested parties full opportunity to be heard on objections raised.

4. The District Engineer, in deciding whether a permit should be issued, shall weigh all relevant factors in reaching his decision. In any case where Directors of the Secretary of the Interior advise the District Engineers that proposed work will impair the water quality in violation of applicable water quality standards or unreasonably impair the natural resources or the related environment, he shall, within the limits of his responsibility, encourage the applicant to take steps that will resolve the objections to the work. Failing in this respect, the District Engineer shall forward the case for the consideration of the Chief of Engineers and the appropriate Regional Director of the Secretary of the Interior shall submit his views and recommendations to his agency's Washington Headquarters.

5. The Chief of Engineers shall refer to the Under Secretary of the Interior all those cases referred to him containing unresolved substantive differences of views and he shall include his analysis thereof, for the purpose of obtaining the Department of Interior's comments prior to final determination of the issues.

6. In those cases where the Chief of Engineers and the Under Secretary are unable to resolve the remaining issues, the cases will be referred to the Secretary of the Army for decision in consultation with the Secretary of the Interior.

7. If in the course of operations within this understanding, either Secretary finds its terms in need of modification, he may notify the other of the nature of the desired changes. In that event the Secretaries shall within 90 days negotiate such amendment as is considered desirable or may agree upon termination of this understanding at the end of the period.

Dated: July 13, 1967.

STEWART L. UDALL,
Secretary of the Interior.

Dated: July 13, 1967.

STANLEY RESOR,
Secretary of the Army.

APPENDIX C

Application No. _____
Name of Applicant _____
Effective Date _____
Expiration Date (If applicable) _____

DEPARTMENT OF THE ARMY

PERMIT

Referring to written request dated _____ for a permit to:

() Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

() Discharge dredged or fill material into navigable waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, P.L. 92-500);

() Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of

Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; P.L. 92-532);

(Here insert the full name and address of the permittee)

is hereby authorized by the Secretary of the Army: to _____

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any, proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into navigable waters or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

in _____
(Here to be named the ocean, river, harbor, or waterway concerned.)

at _____

(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

In accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings: give file number or other definite identification marks.) Subject to the following conditions:

I. General conditions: a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to Sections 301, 302, 306 and 307 of the Federal Water Pollution Control Act of 1972 (P.L. 92-500; 86 Stat. 816), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge or deposit of dredged or fill material into navigable waters, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the permittee agrees to make every reasonable effort to prosecute the construction or work authorized herein in a manner so as to minimize any adverse impact of the construction or work on fish, wildlife and natural environmental values.

e. That the permittee agrees that it will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

f. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

g. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

h. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

i. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that

future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not started on or before _____ day of _____, 19____, (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before _____ day of _____, 19____, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

q. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

r. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

s. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition v hereof, he must restore the area to a condition satisfactory to the District Engineer.

t. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

u. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

v. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in

the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. *Special Conditions:* Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

STRUCTURES FOR SMALL BOATS: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

DISCHARGE OF DREDGED MATERIAL INTO OCEAN WATERS: That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

ERECTION OF STRUCTURE IN OR OVER NAVIGABLE WATERS: That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

MAINTENANCE DREDGING: (1) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for ____ years from the date of issuance of this permit (ten years unless otherwise indicated); and (2) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

Permittee

Date

By authority of the Secretary of the Army:

District Engineer

Date

Transferee hereby agrees to comply with the terms and conditions of this permit.

Transferee

Date

APPENDIX D—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR CONSTRUCTION OR OTHER WORK AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

MAY 24, 1971.

Pursuant to the authority vested in me by the Act of March 3, 1899, c. 425, Sections 10

and 14, 30 Stat. 1151, 1152, 33 U.S.C. Sections 403 and 408, and the Act of June 13, 1902, c. 1079, Section 1, 32 Stat. 371, 33 U.S.C. Section 565, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits for construction or other work affecting navigable waters of the United States. Except in cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed work on the public interest. In cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed work on navigation and national security. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Acts.

The Chief of Engineers and his authorized representatives shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

STANLEY R. RESOR,
Secretary of the Army.

APPENDIX E—DELEGATION OF AUTHORITY TO
ISSUE OR DENY PERMITS FOR THE DISCHARGE
OF DREDGED OR FILL MATERIAL INTO NAVIGABLE
WATERS

MARCH 12, 1973.

Pursuant to the authority vested in me by Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, P.L. 92-500, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into navigable waters at specified disposal sites. The Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed discharge on the public interest. All permits issued shall specify a disposal site for the discharge of the dredged or fill material through the application of guidelines developed by the Administrator of the Environmental Protection Agency and myself. In those cases where these guidelines would prohibit the specification of a disposal

site, the Chief of Engineers, in his evaluation of whether the proposed discharge is in the public interest, is authorized also to consider the economic impact on navigation and anchorage which would occur by failing to authorize the use of a proposed disposal site. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws and any applicable memoranda of understanding between the Secretary of the Army and heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

MARCH 12, 1973.

APPENDIX F—DELEGATION OF AUTHORITY TO
ISSUE OR DENY PERMITS FOR THE TRANSPORTATION OF DREDGED MATERIAL FOR THE PURPOSE OF DUMPING IT INTO OCEAN WATERS

Pursuant to the authority vested in me by Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, P.L. 92-532, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. The Chief of Engineers and his authorized representatives shall, in exercising such authority, evaluate the impact of the proposed dumping on the public interest. No permit shall be issued unless a determination is made that the proposed dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. In making this determination, those criteria for ocean dumping established by the Administrator of the Environmental Protection Agency pursuant to Section 102(a) of the above Act which relate to the effects of the proposed dumping shall be applied. In addition, based upon an evaluation of the potential effect which a permit denial will have on navigation, economic and industrial development, and foreign and domestic commerce of the United States, the Chief of Engineers or his authorized

representative, in evaluating the permit application, shall make an independent determination as to the need for the dumping, other possible methods of disposal, and appropriate locations for the dumping. In considering appropriate disposal sites, recommended sites designated by the Administrator of the Environmental Protection Agency pursuant to Section 102(c) of the above Act will be utilized to the extent feasible. Prior to issuing any permit, the Chief of Engineers or his authorized representative shall first notify the Administrator of the Environmental Protection Agency or his authorized representative of his intention to do so. In any case in which the Administrator or his authorized representative disagrees with the determination of the Chief of Engineers or his authorized representative as to compliance with the criteria established pursuant to Section 102(a) of the above Act relating to the effects of the dumping or with the restrictions established pursuant to Section 102(c) of the above Act relating to critical areas, the determination of the Administrator or his authorized representative shall prevail. If, in any such case, the Chief of Engineers or his Director of Civil Works finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in non-compliance with such criteria or restrictions, he shall so certify and request that I seek a waiver from the Administrator of the Environmental Protection Agency of the specific requirements involved. Unless the Administrator of the Environmental Protection Agency grants a waiver, the Chief of Engineers or his authorized representative shall not issue a permit which does not comply with such criteria and restrictions. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws, and any applicable memoranda of understanding between the Secretary of the Army and the heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

APPENDIX G—TABLE OF CONTENTS AND LIST OF
APPENDICES TO § 209.120

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- [FR Doc.74-7797 Filed 4-2-74;8:45 am]